

# Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries

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## I. DEFINING HOSTILE WORK ENVIRONMENTS IN SEXUALIZED INDUSTRIES

Title VII of the Civil Rights Act of 1964<sup>1</sup> prohibits sexual harassment that creates a hostile work environment because of an employee's sex.<sup>2</sup> For an actionable Title VII claim, the harassment must be unwelcome<sup>3</sup> and sufficiently severe or pervasive to alter the terms, conditions, or privileges of the plaintiff's employment<sup>4</sup> from both objective and subjective perspectives.<sup>5</sup> An employer's liability for the hostile work environment depends on the identity of the harasser or harassers.<sup>6</sup> If the harassers are customers, courts employ a negligence standard holding the employer liable if the plaintiff proves that the employer knew or had reason to know of the harassment and did not take preventive and corrective measures.<sup>7</sup>

In *Harassing "Girls" at the Hard Rock: Masculinities in Sexualized Environments*,<sup>8</sup> I studied the working conditions of blackjack dealers at the Hard Rock Hotel & Casino in Las Vegas and concluded that some customers subject women dealers to severe sexually harassing behavior.<sup>9</sup> The article

1. 42 U.S.C. § 2000e (2000).

2. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

3. *See id.* at 68 (holding that if a woman agrees to have sexual intercourse with her supervisor or coworker, but the sexual relationship is unwelcome, she may have a cause of action even though her acquiescence was voluntary).

4. *Id.* at 65.

5. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

6. If the harasser is a supervisor, the employer is vicariously liable for the harassment, subject to potential affirmative defenses. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *see also Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

7. *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1074 (10th Cir. 1998) (applying the negligence standard to harassment by customers or non-supervisory co-workers); *see also Burlington Indus.*, 524 U.S. at 759 (noting that negligence sets a minimum standard for employer liability under Title VII); *Faragher*, 524 U.S. at 789 (indicating that employer's knowledge of harassment combined with inaction might constitute "demonstrable negligence").

8. Ann C. McGinley, *Harassing "Girls" at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. (forthcoming) (manuscript on file with the Yale Journal of Law & Feminism).

9. *Id.* (manuscript at 9-10). This behavior and management's tolerance of it, the article posits, result from the structure and practice of masculinities. Masculinities comprise both a structure that reinforces the dominance of men over women and a series of practices that maintain men's superior position over women. *See* Michele Adams & Scott Coltrane, *Boys and Men in Families: The Domestic Production of*

explored whether Title VII should protect women employees who knowingly and voluntarily work in highly sexualized environments from hostile work environments created by customers. I concluded that a refusal to protect women blackjack dealers who work in a sexualized environment would penalize them for choosing to work in an industry that provides jobs whose salaries and tips permit the women and their families a middle class lifestyle. Moreover, I concluded, the casino employer who creates the sexualized environment is on notice that customers will likely harass her employees and has the means to prevent and correct such harassment.

One tempting justification for protecting women blackjack dealers working in sexualized environments from harassment is that the job of blackjack dealer has no sexual content. In fact, until fairly recently, blackjack dealers were almost exclusively men.<sup>10</sup> To bar Title VII protection for women integrating these jobs would, in essence, permit unequal work conditions for women and men in the same job and might deprive women of better paying jobs in casinos. It seems clear, therefore, that the law should protect women blackjack dealers from customer harassment in casinos.

The unspoken assumption underlying this justification, however, is that women who work in more sexualized jobs than that of blackjack dealer do not merit protection from sexual harassment by customers. This assumption needs examination. Like the women blackjack dealers at the Hard Rock, cocktail servers, exotic dancers, and prostitutes in legal brothels are vulnerable to sexual

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*Gender, Power, and Privilege*, in HANDBOOK OF STUDIES ON MEN & MASCULINITIES 230, 236 (Michael S. Kimmel et al. eds., 2005); David Collinson & Jeff Hearn, *Naming Men as Men: Implications for Work, Organization and Management*, 1 GENDER, WORK & ORG. 2, 13-16 (1994); Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in FEMINISM & MASCULINITIES 182, 183-85 (Peter F. Murphy ed., 2004). "Difference from girls is an integral component in the construction of dominant masculinity . . . masculinity is always constructed in relation to a dominant image of gender difference and ultimately defines itself as what femininity is not." Jon Swain, *Masculinities in Education*, in HANDBOOK OF STUDIES ON MEN & MASCULINITIES, *supra*, at 213, 223.

Some men practice masculinities because of fear of oppression by other men. See Joseph H. Pleck, *Men's Power with Women, Other Men and Society: A Men's Movement Analysis*, in FEMINISM & MASCULINITIES, *supra*, at 57, 64. Men and boys join in collective competitions of masculinity in which they oppress women, exploit them sexually, and treat them as inferiors. *Id.* at 63-64. For a more thorough explanation of masculinities theory, see Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004).

10. Before 1958 a few women worked as blackjack dealers in the smaller casinos in Las Vegas. In 1958, however, the City Commission passed a resolution banning women from dealing blackjack or other table games in the casinos in Las Vegas. Those testifying at a hearing on the resolution argued that permitting women to continue to deal blackjack in Las Vegas casinos would destroy the city's economy by lowering salaries because casino employers were hiring women at lower salaries than men. See Donna Burrows, *The Woman 21 Dealer in Las Vegas: An Examination of Her Special Place in the Gaming Industry* 78-86 (1993) (unpublished B.S. thesis, California Coast University) (on file with author) (reprinting the resolution and a transcript of the hearing regarding the resolution). It was not until 1970 that the Las Vegas City Council repealed the resolution. *Id.* at 25-26. Burrows suggests that by 1993 a majority of all blackjack dealers were women. *Id.* See also KARIN WEBER, *THE CAREER DEVELOPMENT OF FEMALE EXECUTIVES IN LAS VEGAS CASINO INDUSTRY* 3 (1998) (noting that casinos attempt to hire even numbers of men and women in front-line positions).

harassment by customers. The question, when considering these occupations, is whether Title VII<sup>11</sup> should recognize and redress sexual harassment suffered by employees at the hands of customers where the work is sexual in nature and/or the environment is highly sexualized.

The answer to this question is difficult and controversial. One commentator argues that women working in sexualized industries waive their Title VII protection by voluntarily assuming the risk of sexual harassment when they take the job.<sup>12</sup> A second commentator responds that "the legal definition of harassment should not waiver [sic] across differing contexts,"<sup>13</sup> and, therefore, the assumption of risk defense should not apply to Title VII suits brought by women working in sexualized industries.

Neither of these views is completely defensible. The first would divide women into two categories: those who deserve protection from harassment, and those who do not. This view pardons the employer who benefits from the harassment and the men who harass women workers and blames the bad behavior on the victim.<sup>14</sup> The second commentator, while attempting to protect women from the assumption of risk defense, assumes that hostile work environments are static, definable conditions unrelated to the workplace or the job in question. There is no question, however, that the social context of the workplace is extremely important in determining whether sexual harassment occurs. Behavior that creates a cause of action for sexual harassment in a non-sexualized workplace may actually constitute agreed-upon terms or conditions of the employment of workers in sexualized workplaces.

This Article considers how sexual harassment law should apply to women working in four different jobs: blackjack dealers, casino cocktail waitresses, exotic dancers, and brothel prostitutes.<sup>15</sup> By examining the responsibilities of these particular jobs, the environments in which women perform them, and the legitimate expectations of women workers, employers, and patrons, the Article proposes a methodology for defining when a legally compensable hostile work environment exists in sexualized industries.

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11. 42 U.S.C. § 2000e *et seq.* Title VII forbids discrimination "because of . . . sex," which includes sexual harassment. *See infra* Part III.

12. Kelly Ann Cahill, Note, *Hooters: Should There Be An Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107 (1995).

13. Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163, 193 (1997).

14. This concept is explicit in the recently released popular film NORTH COUNTRY (Warner Bros. 2005), which is loosely based on the true story of women who experienced severe sexual harassment when they worked in the taconite mines in Minnesota. In one scene, the father of the main character, who also works in the mine, criticizes his male coworkers for harassing his daughter, their coworker, even though they would never treat the wives or daughters of other miners with disparagement if they did not work at the mine. The idea that women mine workers deserve sexual harassment because they work in jobs ordinarily held by men may seem anachronistic, but this concept is remarkably similar to the idea that women who work in sexualized environments deserve sexual harassment.

15. Prostitution is legal in counties in Nevada with a population of fewer than 400,000 people. *See* NEV. REV. STAT. ANN. § 244.345 (2005).

Part II examines social science literature that defines the gendered nature of work that may be invisible to most observers. In light of this research, it analyzes the jobs and work environments of women dealers, cocktail waitresses, exotic dancers, and brothel prostitutes. It compares the jobs to one another and to those of women in non-sexualized industries, examines the commodification that nearly all women experience at work, and posits that drawing lines between sex(y) workers and other working women is problematic.<sup>16</sup>

Part III examines the rationale for protecting sex(y) workers from harassment, and concludes that Title VII should protect women working in sexualized industries from hostile work environments that alter the terms or conditions of employment. It then adapts hostile work environment standards to the context of claims brought by these workers.

Finally, the Article concludes that most women in sexualized and non-sexualized industries trade on their gender or sexuality at work. While this commodification may not be ideal, and women in some jobs suffer for refusing to engage in gendered emotional labor, the decision to engage in gendered or sexual labor should not disqualify women from Title VII's protection against hostile work environments.

## II. WOMEN WORKERS' REALITIES IN SEXUALIZED AND NON-SEXUALIZED INDUSTRIES

### A. Gendered and Sexual Job Components

In *Hooters: Should There Be An Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*,<sup>17</sup> Kelly Ann Cahill proposes that a woman who knowingly and voluntarily works in a job in which sex appeal plays a substantial role assumes the risk that customers will harass her.<sup>18</sup> Cahill argues that women should avoid the label of "victim" and take responsibility for their own actions in order to enjoy equal status.<sup>19</sup> In discussing the *Hooters* cases,<sup>20</sup> Cahill argues that women who freely choose to

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16. I use the term "sex(y) worker" throughout this Article to include women workers whose job conditions or content include the selling of sex appeal, sexual entertainment, or sexual services.

17. Cahill, *supra* note 12.

18. *Id.* at 1139 n.164.

19. *Id.* at 1145-47. See generally Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994).

20. See generally Kenneth L. Schneyer, *Hooting: Public and Popular Discourse About Sex Discrimination*, 31 U. MICH. J.L. REFORM 551 (1998); Sclafani Rhee, *supra* note 13, at 191. *Hooters* is a restaurant chain that advertises its food by selling the sexuality of waitresses who dress in tight, midriff-baring shirts and shorts. Schneyer, *supra*, at 565. The shirts, which are worn very tight, exhibit two large eyes of an owl over the breasts. "Hooter" is also a slang term for breast. See Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can It Support a Hostile Work Environment Claim Brought By a Nude Dancer?*, 24 N.Y.U. REV. L. & SOC. CHANGE 271, 291-96 (1998). A number of

profit from their sexuality should relieve their employers of liability for customer harassment.<sup>21</sup> Cahill posits that by accepting the job, a woman implicitly contracts with her prospective employer to "assume the risk" of sexual harassment in her job.<sup>22</sup> While Cahill justifies her proposal with an argument regarding women's agency and freedom,<sup>23</sup> her solution would reinforce a public attitude that is tinged with sexism. This attitude holds that women who work in jobs requiring them to wear costumes accentuating their breasts and exposing their legs should expect sexual harassment.

Application of the assumption of risk defense in such a case would employ the law to reinforce the popular conception that there are only two kinds of girls: "good girls" and "bad girls." Sociologists Deborah Tolman and Tracy Higgins explain that, in the "good girl/bad girl" dichotomy, "good girls" deserve rewards and protection because they do not entertain sexual desire, while "bad girls," who openly enjoy their sexuality, must be contained, blamed, and scorned.<sup>24</sup> Tolman and Higgins conclude that our culture uses law to assign to women and girls the responsibility of "regulating heterosexual sex by resisting male aggression."<sup>25</sup> Professors Tolman and Higgins state:

Defined as natural, urgent, and aggressive, male sexuality is bounded, both in law and in culture, by the limits of women's consent. Women who wish to avoid the consequences of being labeled "bad" are expected to define the boundaries of sexual behavior, outlined by men's desire, and to ignore or deny their own sexual desire as a guide to their choices . . . .

. . . [T]he cultural and legal sanctions on teenage girls' sexuality convey a simple message: good girls are not sexual; girls who are sexual are either (1) bad girls, if they have been active, desiring sexual agents or (2) good girls, who have been passively victimized by boys'

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lawsuits were filed against Hooters, some by women employees for sexual harassment by customers, and some by men who applied for jobs as waiters but were rejected on the basis of their sex. *Id.*

21. Cahill, *supra* note 12, at 1146.

22. *Id.* at 1122-24. In fact, the Hooters employees are required to sign a waiver that states:

I hereby acknowledge and affirm . . . that the Hooters concept is based on female sex appeal and that the work environment is one in which joking and innuendo based on female sex appeal is commonplace . . . I also expressly acknowledge and affirm that I do not find my job duties, uniform requirements, or work environment to be offensive, intimidating, hostile or unwelcomed.

HOOTERS OF AMERICA, INC., EMPLOYEE HANDBOOK 24 (1995), as quoted in Sclafani Rhee, *supra* note 13, at 191.

23. Cahill, *supra* note 12, at 1145-47.

24. See Deborah L. Tolman & Tracy E. Higgins, *How Being a Good Girl Can be Bad for Girls*, in "BAD GIRLS"/"GOOD GIRLS" 205 (Nan Bauer Maglin & Donna Perry eds., 1996) ("When women act as sexual agents, expressing their own sexual desire rather than serving as the objects of men's desire, they are often portrayed as threatening, deviant, and bad."). See also NAOMI WOLF, *PROMISCUITIES: THE SECRET STRUGGLE FOR WOMANHOOD* xxi (1997) (explaining that when a woman's sexual history is revealed she is "separated from the 'good girls'" and loses her credibility in the professional world).

25. Tolman & Higgins, *supra* note 24, at 205-206.

raging hormones . . . the good girl/bad girl dichotomy organizes sexuality for young women.<sup>26</sup>

While Tolman and Higgins explain the "good girl/bad girl" dichotomy in sexual terms, in order to explain women's sexual and gendered commodification at work I expand the use of the "good girl/bad girl" terminology to include *all* of the cultural concepts of behavior that society condones or condemns because of compliance or failure to comply with gender stereotypes, rather than simply those relating to sexual behavior. Under this expanded definition, "good girls" conform to societal gender expectations and "bad girls" do not. These expectations constantly change and often vary with class and race. Nonetheless, at a given time, there exists a "hegemonic femininity," a predominant definition of appropriate behavior for women. This definition ordinarily reinforces the values of white, upper-middle-class, and well-educated individuals.

When we consider this expanded definition of "good girl" and "bad girl," the lines between women who sell sex and those who do not become blurred. Jobs requiring women to sell sex or sex appeal and thus engage in "bad girl" behavior also require them to engage in gendered behavior that society condones as "good girl" work. The converse is also true. Women who work in male-dominated jobs with no sexual content (good girls) may be harassed because they challenge societal gender expectations of women by working in a "man's job" (thus becoming bad girls).<sup>27</sup>

### *B. Emotional Labor and Good Girls*

Women who work in sexualized industries are not the only women who exchange their status as women for money. While sexualized behavior is one way in which women commodify their sex, women who work in non-sexualized jobs also engage in sales of themselves as women. They earn rewards by performing emotional labor that is expected of them as women. Emotional labor may be a legitimate requirement of the job (such as the job of kindergarten teacher) or it may be required only of women and not men performing the job (such as the job of a paralegal).

Sociologists describe supportive and caring behavior that becomes part of one's job requirements as "emotional labor."<sup>28</sup> In *The Managed Heart: Commercialization of Human Feeling*,<sup>29</sup> sociologist Arlie Hochschild defines emotional labor as "the management of feeling to create a publicly observable

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26. *Id.*

27. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1776 (1998) (explaining that in jobs that are male-dominated, men reinforce the definition of the job as masculine by abusing women and men who do not conform to gender stereotypes).

28. See ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART* 7 n.\* (1983).

29. *Id.*

facial and bodily display,” and argues that emotional labor has “exchange value” because it is “sold for a wage.”<sup>30</sup> As Hochschild demonstrates, women do more emotional labor than men.<sup>31</sup> Even when performing the same job, the expectations of men and women are different.<sup>32</sup> Because women are less powerful and have less access to authority and status in society, they have a weaker “status shield,” making them more vulnerable to the displaced feelings of others.<sup>33</sup> The performance of emotional labor is “good girl” behavior because it comports with the traditional stereotype of woman as caregiver.

Hochschild studied flight attendants at Delta Airlines and found that the airline hired women flight attendants who projected warm personalities<sup>34</sup> and taught attendants techniques to manage their emotions when dealing with passengers. These techniques included “surface acting”—putting on a calm, friendly face—and “deep acting”—learning to empathize with the customer through acting techniques. The training encouraged flight attendants to create a gracious and homey environment for passengers and to induce positive emotions for passengers by thinking about how the passengers resemble people the attendants know.<sup>35</sup> The training teaches flight attendants to obscure their own emotions of fear in the event of a crash,<sup>36</sup> to manage their own anger at passengers who treat them rudely,<sup>37</sup> and to interact with other flight attendants in a positive way, avoiding complaints or anger.<sup>38</sup>

These expectations regarding emotional labor exist in other jobs. In *Emotional Labor in Service Work*,<sup>39</sup> sociologist Robin Leidner studied fast food workers and insurance sales personnel. She observed that emotional labor was crucial to interactive service jobs because “it is impossible to draw clear distinctions between the worker, the work process, and the product or outcome, because the quality of the interaction is frequently part of the service being

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30. See *id.* at 7 n.\*.

31. While about one-third of American workers, both male and female, have jobs that impose substantial demands for emotional work, approximately half of working women occupy jobs requiring emotional work. *Id.* at 11. Jobs that require emotional labor have three common characteristics: 1) face-to-face contact with the public; 2) the worker produces an emotional state in another person; and 3) supervisors exercise control over employees’ emotional activities. *Id.* at 147.

32. *Id.* at 171-74; see also JENNIFER L. PIERCE, GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS 86-102 (1995) (noting emotional labor required of female paralegals).

33. See generally HOCHSCHILD, *supra* note 28. Hochschild found that airline passengers assumed that male flight attendants had supervisory authority over their female counterparts, even when the men were younger with less seniority. *Id.* at 177. This assumption of male authority led passengers to scapegoat the women flight attendants more than the men and often led women to ask for help from their male counterparts in dealing with difficult passengers. *Id.* at 177-80.

34. *Id.* at 96-97.

35. *Id.* at 105.

36. *Id.* at 107.

37. *Id.* at 113 (recommending focusing on the other person, acknowledging to oneself that one will soon be able to escape, and permitting attendants to share stories of how to dispel anger, e.g., by chewing on ice).

38. *Id.* at 116.

39. Robin Leidner, *Emotional Labor in Service Work*, 561 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (1999).



delivered . . .”<sup>40</sup> Leidner noted that producing an emotional response in the customer is integral to the job itself and that customers are part of the work, not mere observers.<sup>41</sup> Leidner found that employers at McDonald’s closely supervised the dress, attitudes, and behavior toward customers of fast food workers, even giving them specific scripts to follow.<sup>42</sup> And in *Gender Trials*,<sup>43</sup> sociologist Jennifer Pierce studied the expectations of female and male paralegals in a large law firm and the legal offices of a large corporation, and found that women paralegals were expected to smooth the ruffled feathers of the male lawyers for whom they worked and absorb the lawyers’ aggressive behavior and criticism without complaining.<sup>44</sup> If women paralegals did not provide the expected caring behavior, they were reprimanded or penalized for it.<sup>45</sup> Male paralegals did not work under similar restraints.<sup>46</sup>

Although the jobs of Leidner’s service employees, Hochschild’s flight attendants, and Pierce’s paralegals had little sexual content, they required workers to exchange intimate parts of themselves—the ability to respond with “natural” emotions to customer requests and complaints and the boss’s demands—for their salaries.<sup>47</sup> This exchange involves the commodification of the women employees as women. To succeed in a job whose objective requirements can be performed by men or women or persons with mixed genitalia, the women must enact the gendered behavior that society expects and condones of women. This feminine-gendered behavior includes caring, listening, soothing, anticipating another’s needs, and boosting another’s sense of self while simultaneously remaining invisible. This emotional labor tracks the expected behavior of a mother. As we shall see in the next Section, women working in the jobs of blackjack dealer, cocktail waitress, exotic dancer, and brothel prostitute perform varying degrees of gendered emotional labor that

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40. *Id.* at 83.

41. *Id.*

42. *Id.* This behavior, however, required only surface acting. *Id.* (For a definition of “surface acting,” see *infra* note 68.) The employees were asked to appear happy and helpful. Unlike the flight attendants Hochschild studied, the McDonald’s workers were not asked to empathize with the customers. The insurance salesmen, in contrast, were expected to engage in deep acting or even real transformation of their own beliefs in order to persuade their prospective customers. Leidner, *supra* note 39, at 86. This behavior and personal transformation were accomplished via indoctrination into corporate culture through tapes, books, manuals, classes, meetings, and ceremonies designed to promote a sense of inclusion, a cult-like focus on the story of the founder or leader, and a very detailed scripting of behavior and feelings. *Id.* at 86-88.

43. PIERCE, *supra* note 32.

44. *Id.* at 86-102.

45. *Id.* at 88, 92.

46. *Id.* at 147.

47. Scholars in commodification theory have argued for the legalization and regulation of prostitution by noting this exchange of intimacy in “non-sexual jobs.” See, e.g., Martha C. Nussbaum, *Taking Money for Bodily Services*, in *RETHINKING COMMODIFICATION* 243, 243-47 (Martha M. Ertman & Joan C. Williams eds., 2005) (noting that professors, lawyers, singers, doctors, and legislators sell their bodily services for money and comparing prostitution to the jobs of a chicken factory worker, philosophy professor, and colonoscopy artist).

would otherwise be condoned, or even required, by society. In fact, as the sexual content of the jobs increases, the emotional labor also increases. It seems, therefore, that the "bad girls" who sell sex also perform gendered emotional labor at work that society associates with "good girls."

### *C. The Sexualized and Gendered Workplace*

#### *1. Blackjack Dealers*

Blackjack dealers work in a stressful environment that requires intense concentration. They must control the game by working quickly to assure that the house has the advantage and that players are not counting cards. It is crucial that the blackjack dealer "keep her cool." If she is rattled, she will lose her concentration, which can lead to expensive mistakes. Because of the concentration required, blackjack dealers at the Hard Rock work at the gaming tables for one hour and are off for a twenty minute break.<sup>48</sup> Dealers may not leave their tables at any time in between breaks for any reason.<sup>49</sup> This schedule repeats itself for an eight-hour shift.<sup>50</sup>

While dealers earn relatively small salaries,<sup>51</sup> they take in significant sums in tips.<sup>52</sup> The tips are collected in a general pot and distributed among all dealers who have worked over a 24-hour period. Because of this tipping system, dealers have a sense of responsibility to their coworkers and an

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48. See McGinley, *supra* note 8.

49. *Id.*

50. *Id.*

51. In Las Vegas, although many employees in the casinos are unionized, in a majority of the casinos the blackjack dealers are not represented by a union. There have been a number of attempts to unionize the dealers, most of which have failed. In the most recent attempt to unionize during the winter and spring of 2001, the Transport Workers Union of America held elections at eleven Strip casinos. Of the eleven properties, eight voted against unionization and three properties—the Tropicana, New Frontier, and Stratosphere—voted to have the union represent the dealers. See Sharon Gerrie, *Dealers Elections: Union Turns to Negotiations*, LAS VEGAS REV.-J., Mar. 12, 2001, at 1D. At the Stratosphere, the dealers later voted to decertify the union, which had difficulty negotiating a contract with management. See Dave Berns, *Dealers Decertify Union*, LAS VEGAS REV.-J., Apr. 9, 2002, at 1D. At the New Frontier, a contract was negotiated but the contract gave few concessions to the union. The dealers' wages were frozen for two years and the management retained control over seniority and grievance issues. See Dave Berns, *New Frontier, Union Agree to Three-Year Deal*, LAS VEGAS REV.-J., Mar. 16, 2002, at 1D ("At-will firing of dealers provides a powerful stick for managers seeking to penalize dealers who irritate high rollers or floor bosses, and executives fear that unionization will cut into the juice of managers whose power is measured in their ability to hire, fire and reassign.").

52. The dealers I interviewed at the Hard Rock estimated that they can make up to \$75,000 or \$80,000 annually. Interview with blackjack dealer, in Las Vegas, Nev. (Feb. 22, 2005). At the less successful properties, dealers make less than \$40,000 in salaries and tips. See Dave Berns, *New Frontier Dealers to Consider Tentative Agreement Reached by Union, Casino*, LAS VEGAS REV.-J., Mar. 5, 2002, at 1D.

incentive to raise the pot. Their loyalty to the other dealers discourages them from compromising their ability to earn the largest amount possible in tips.<sup>53</sup>

Blackjack dealers must enforce "house rules" that ensure speedy play and result in profits for the casino.<sup>54</sup> The rules require that blackjack players use only one hand when touching their cards, scratch the table with their cards to request an additional card, or tuck cards underneath the wager if they do not want another card.<sup>55</sup> A player who exceeds twenty-one must flip the cards to signal the game's end.<sup>56</sup> Tucking or flipping cards over signals the dealer to move to the next player's hand.<sup>57</sup> When players get angry while losing money, they intentionally slow the pace of the game by refusing to tuck or to disclose that they have gone over twenty-one.<sup>58</sup> The casino expects the dealer to maintain control over this situation and keep up the game pace.<sup>59</sup> For the dealer, speed or "game pace" is a key objective measurement of job performance.<sup>60</sup>

Besides the high stress required by the fast pace of the game itself, blackjack dealers work in a stressful, noisy, and, in some casinos, highly sexualized environment. At the Hard Rock, for example, the management emphasizes the theme of sex, drugs, and rock 'n roll in promotions, advertising, decor, employee dress codes, and hiring.<sup>61</sup> Rock music blasts, and the clientele is often inebriated. Patrons become angrier and angrier as they lose hand after hand. Often, this anger boils over into comments directed at men and women dealers.<sup>62</sup> There is a qualitative and quantitative difference, however, between the abuse directed at the women and the men dealers. Daily, patrons, particularly the "high rollers"—customers who wager great sums at the gaming tables—hurl abusive gender-based epithets at the women, often calling them "bitch" and "cunt."<sup>63</sup> Patrons openly discuss the women's body parts, telling women dealers how they would use the women sexually.<sup>64</sup> Customers make racist remarks about the Asian women dealers.<sup>65</sup> On occasion, they grab the women or threaten to rape or shoot them.<sup>66</sup>

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53. See McGinley, *supra* note 8.

54. Jin Kim, Can an Employer Create a Hostile Working Environment Through Its Advertisements? 21 (Apr. 15, 2005) (unpublished manuscript, on file with the Yale Journal of Law & Feminism).

55. *Id.* at 21-22.

56. *Id.* at 22.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. For a lengthier discussion of the advertising, promotions, and decor at the Hard Rock Hotel & Casino in Las Vegas, see *id.* at 21-27.

62. See *id.* at 22-23.

63. *Id.* at 2-3, 29; McGinley, *supra* note 8.

64. Kim, *supra* note 54, at 2-3, 29.

65. *Id.* at 2.

66. *Id.* at 29.

This behavior, if tolerated or condoned by management, places the women dealers in the position of subsidizing their male counterparts who share the tips but need not tolerate similar abuse. Moreover, women dealers who encounter this behavior expend significant emotional labor in managing their own emotions and those of the clientele.<sup>67</sup> Women employees perform this emotional labor primarily by “surface acting”—appearing to be unaffected by the behavior of the abusive patrons and attempting to act pleasant or to flirt with the customers.<sup>68</sup>

A former blackjack dealer for the Hard Rock describes the disadvantage suffered by women dealers:

It was difficult maintaining control of angry players who are [sic] losing money, especially when [they were] drinking. It is almost impossible to maintain control of an angry, drunk player who stereotypes women as sexual and servile. [The sexually suggestive ads and promotions] are harmful because in addition to being offensive, they prime the male players to view women sexually and not as the competent, authoritative employees.<sup>69</sup>

## 2. Casino Cocktail Waitresses

In Las Vegas casinos, cocktails are served exclusively by women. In many of the casinos, cocktail waitresses are members of a union who work for salaries that are supplemented by handsome tips.<sup>70</sup> Unlike blackjack dealers, cocktail servers retain their own tips so there is less pressure to increase the pot for the good of the group.<sup>71</sup> Nonetheless, cocktail waitresses are vulnerable to severe sexual harassment by customers. Many casinos require the women to be young,<sup>72</sup> thin, shapely, and willing to wear skimpy, revealing costumes that

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67. This emotional labor is similar to that of flight attendants studied by Arlie Hochschild. See generally HOCHSCHILD, *supra* note 28.

68. Hochschild defines “surface acting” as deceiving others as to how we feel without deceiving ourselves. *Id.* at 33. “Deep acting” would require the dealers to summon up empathy for the patrons because it requires one to actually change one’s emotions. *Id.* None of the women blackjack dealers described such empathy or attempts to summon these emotions. Moreover, it appears that there is no training that encourages deep acting. Rather, a number of the blackjack dealers I interviewed told me that the management criticizes women who do not put up with the abusive behavior or who are not friendly to the patrons in the face of gender-based insults. See McGinley, *supra* note 8. This criticism appears to be based on a failure to perform “surface acting.”

69. Kim, *supra* note 54, at 23 (citations omitted).

70. A number of casinos, however, are non-union for all employees. These include the Hard Rock Hotel & Casino and the Venetian.

71. Interviews with cocktail servers and blackjack dealers from various Las Vegas casinos, in Las Vegas, Nev. (May 2005).

72. A few of the older casinos have reputations for employing older cocktail waitresses, a reputation that does not win them additional business with the young “in crowd.” See Jane Ann Morrison, *Horseshoe Customers Hope New Owners Have Some of Benny Binion’s Touch*, LAS VEGAS REV.-J., Apr. 3, 2004, at 1B (noting that the Horseshoe Casino reopened and hired back many older cocktail waitresses, and that “[t]his was not a crowd transplanted from the Palms or the Bellagio”).

emphasize their legs, breasts, and buttocks.<sup>73</sup> Many cocktail servers have their breasts surgically enhanced to conform to the stereotype of the buxom beauty.<sup>74</sup> Few challenge the casinos' practice of hiring women exclusively into these positions.<sup>75</sup>

Industry representatives who defend the view that cocktail servers should be young women dressed in costume argue that Las Vegas sells "fantasy" to its visitors.<sup>76</sup> Part of the fantasy for men is service by a young, beautiful, scantily-clothed woman. Fulfilling this fantasy affirms the man's masculinity and demonstrates to other men that he is worthy of the woman's attention and membership in the dominant masculine group.<sup>77</sup> Tight-fitting costumes, combined with management's permissive stance toward customer behavior, subject the servers to comments and groping by drunk customers.<sup>78</sup> Patrons comment on women's breasts and legs. While not all cocktail servers find this behavior offensive, many do.<sup>79</sup> Some are too young and inexperienced to understand that they have a right to complain about this behavior.<sup>80</sup>

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73. The Imperial Palace, for example, was sued by a class of pregnant cocktail servers alleging sex discrimination based on a policy that requires pregnant employees to take leave during pregnancy or be reassigned to a job out of the view of patrons. Warren Bates, *Two Pregnant Women Join Lawsuit Against Imperial Palace*, LAS VEGAS REV.-J., Dec. 19, 1997, at 2B.

74. Interviews with a cocktail waitress at the Imperial Palace and with several blackjack dealers at the Hard Rock Hotel & Casino, in Las Vegas, Nev. (May 2005).

75. Columnist John L. Smith described the reaction to his criticism of skimpy costumes at the Rio Hotel and Casino:

[T]he Rio hotel . . . some years ago had a group of "Ipanema Girl" cocktail waitresses who had the audacity to protest the company's hiring practices and insistence on the wearing of high heels and uniforms the women sometimes referred to as "butt floss." I described their fight in a column, and mentioned that the rest of the world seemed to have moved ahead of us in the treatment-of-women-as-pieces-of-meat department, and received a large response.

All negative. The men hated the column because I was picking on the babes with the schwinging butt floss outfits. The women, at least those not litigating against the resort, hated the column because they loved their uniforms, thought they looked sexy and knew a little flank flesh flashing meant healthier tips from customers.

John L. Smith, *Las Vegas Has Long Way to Go in Dealing With Sexual Harassment*, LAS VEGAS REV.-J., Apr. 25, 2001, at 1B.

76. See Warren Bates, *Two Pregnant Women Join Lawsuit Against Imperial Palace*, LAS VEGAS REV.-J., Dec. 19, 1997, at 2B (quoting a letter by the personnel director of the Imperial Palace to the Nevada Equal Rights Commission that states, "The scantily clad female is a symbol of all that is popular and expected in Las Vegas."); Carri Geer, *Servers' Lawsuit Reaches Court*, LAS VEGAS REV.-J., July 6, 2000, at 1B (explaining that the counsel to the Imperial Palace noted that Las Vegas promotes itself as a place offering "adult pleasures" and that his client uses the image of sexy cocktail waitresses to compete with other casinos).

77. See generally McGinley, *supra* note 9.

78. See Emily Kumler, *Little Rehabilitation at Rehab*, LAS VEGAS REV.-J., May 26, 2005, at 13E (describing bikini-clad cocktail waitresses at the Hard Rock Rehab pool party who are groped as they wind their way with trays above their heads); John L. Smith, *'Stationize' or Else: Many Longtime Santa Fe Cocktail Waitresses Await Fate*, LAS VEGAS REV.-J., Sept. 20, 2000, at 1B ("Although the money [a cocktail waitress] earns in the best joints soothes the most sensitive soles, management dictates she must dress like a piece of Playboy Mansion Christmas candy for the privilege of serving drinks to tourists. Maneuvering through a fog of cigarette smoke, she is pinched, prodded, ogled and wolf-whistled.").

79. One cocktail waitress stated that the customers, coworkers, and supervisors comment on her body regularly. This behavior makes her uncomfortable, but she does not feel free to complain about it. Interview with a cocktail waitress, in Las Vegas, Nev. (May 27, 2005). A blackjack dealer at the Hard

### 3. *Exotic Dancers*<sup>81</sup>

"Gentlemen's clubs" feature women performing striptease on stage and individual services for men seated at tables. Ordinarily, at any given time there are dancers on stage and other dancers circulating throughout the club, asking men if they would like to buy a "table dance"<sup>82</sup> or talking and flirting with the men.<sup>83</sup> Circulation allows for increased individual attention to the male guests and the formation of relationships between "regulars" and the dancers.<sup>84</sup> Gentlemen's clubs rely on fantasy to run their businesses. The fantasy is that the dancer is sexually and personally interested in the customer. The customer, no matter how ugly or out of shape, believes for a short time that he is "attractive, . . . powerful, . . . virile . . . compassionate and interesting."<sup>85</sup>

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Rock stated she witnessed a cocktail waitress hit a patron with her tray in response to the patron's groping of her body. Interview with blackjack dealer, in Las Vegas, Nev. (Mar. 19, 2005).

80. Interview with a former cocktail waitress at a Reno casino, in Las Vegas, Nev. (May 27, 2005).

81. Title VII protects employees of a covered employer, but not independent contractors. In Las Vegas, the entertainers and the owners of the clubs consider the strippers to be independent contractors. However, the language used by the parties to characterize the working relationship does not determine whether the strippers are employees for purposes of federal and state employment discrimination laws. See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1046, 1048 n.3 (9th Cir. 2002) (discussing Microsoft concession that "freelancers" were common-law employees). The key to determining whether workers are employees or independent contractors is the amount of control exerted by the employer over the manner and means of work. See *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 448-49 (2003). Entertainers (exotic dancers) in Las Vegas pay to perform in the clubs, according to Brent Kenton Jordan, a bouncer with 20 years of experience in Las Vegas and San Diego gentlemen's clubs and the author of *Stripped: Twenty Years of Secrets from Inside the Strip Club*. Interview with Brent Kenton Jordan, in Las Vegas, Nev. (Dec. 13, 2005). This is true in other clubs across the country. See KATHERINE FRANK, G-STRINGS AND SYMPATHY: STRIP CLUB REGULARS AND MALE DESIRE xiii (2002). Given this relationship, they may indeed be independent contractors under the law, but there are other control factors that indicate that they may be employees. Frank told me that she worked as an employee for the six years she was a dancer. Danielle Egan, in contrast, told me that she worked as an independent contractor. Interview with Katherine Frank and Danielle Egan, in Las Vegas, Nev. (Mar. 13, 2006).

82. FRANK, *supra* note 81, at 26-27.

83. See *id.*

84. *Id.*

85. BRENT KENTON JORDAN, *STRIPPED: TWENTY YEARS OF SECRETS FROM INSIDE THE STRIP CLUB* 144 (2004). This book is characterized as "a satirical parody" by its publisher, most likely to avoid a defamation lawsuit, but the story told appears to refer to actual happenings inside a Las Vegas strip club. Although I do not rely on this book for accurate statements concerning the particular strip club or the particular people involved in questionable activity, I cite to this book because the author claims to have acquired insider information as a bouncer working for twenty years in strip clubs in and outside of Las Vegas. In a news interview, the author stated, "I had to label the book 'satire' so I don't get sued." Scott Dickensheets, *Tall Tales from the Strip Club: A Bouncer with a Book Dishes Dirt*, LAS VEGAS WEEKLY, June 2, 2005, available at <http://www.lasvegasweekly.com/2005/06/02/feature2.html>. The author also stated in the same interview that he wrote the book because he knew the inside story. He claimed that journalists and others studying strip clubs could write about their impressions, but they did not know how the strip clubs worked. *Id.* This claim appears to contradict the author's characterization of the book as "satirical parody." An unidentified spokesman from Cheetah's, the club where Jordan spent twelve years as a bouncer, stated, however, that the author embellished much of what happened in the club. *Id.* Even if the material in the book is embellished, it seems that the discussion of the working conditions of the exotic dancers is accurate. An in-person, two-hour interview that I had with Brent Jordan convinced me that his book and the comments he made during the interview honestly represented the conditions at the strip clubs where he has worked. Interview with Jordan, *supra* note 81.

In *G-Strings and Sympathy: Strip Club Regulars and Male Desire*, sociologist Katherine Frank described her experiences dancing in exotic dance clubs for six years.<sup>86</sup> For part of this time, she studied the regular male clientele to ascertain their motivations for frequenting strip clubs. In the strip clubs where Frank worked, men were not permitted to touch the dancers and there was no opportunity for sexual release.<sup>87</sup> She questioned why men would attend the clubs rather than visit a prostitute or use pornography, massage parlors, or peep shows. Frank's interviews revealed that the men's reasons for going to strip clubs were complicated. While attendance did not provide sexual release, it gave them a sexual identity, a means to relax, a sense of excitement because their behavior was transgressive but simultaneously "safe," an opportunity to speak to women other than their wives or partners about explicit sexual matters, a chance to be seen speaking with beautiful nude women, and, on occasion, an opportunity to perform dances themselves.<sup>88</sup>

Many dancers spent time talking to their customers about the customers' wives and families. The dancers often referred to themselves as "therapists" whose jobs include boosting the customers' egos by showing them that they are "desirable, masculine, and successful."<sup>89</sup> Frank notes that the interactions between dancer and customer become complicated because the dancer not only displays her body, but also sells versions of her "self"—including her personality, attention, and conversation—in order to sustain the relationship with the customer.<sup>90</sup> Frank states:

Interactions between dancers and their customers in the gentlemen's club are thus premised on the commodification of three interrelated elements: bodies made visible in particular ways, identities (public images and personal self-representations), and the production of particular forms of intimate interaction and experience (exposures, conversations, caretaking, mutual constructions of fantasy), a production of what I have elsewhere referred to as the "commodification of intimacy" . . . .<sup>91</sup>

While Frank acknowledges that the relationships with customers do not approach the intimacy of life-long partners, she explains that "some commodified transactions do involve intimate exchanges, involving trust, revelation, emotional engagement, and even love between the two parties, especially if the relationship is ongoing in the context of the club."<sup>92</sup> Even

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86. FRANK, *supra* note 81, at xx.

87. *Id.* at xxii-xxiii (explaining that lap dancing is a "different kind of entertainment" from other striptease because it offers the possibility of sexual release).

88. *See generally id.*

89. *Id.* at 119.

90. *Id.* at 27.

91. *Id.* Frank notes that the "commodification of intimacy" expands on Hochschild's theory of emotional labor. *Id.* For a discussion of Hochschild, see *supra* Part II.B.

92. FRANK, *supra* note 81, at 28.

when there is no special intimate relationship between the dancer and the customer, many customers desire to be treated as "special."<sup>93</sup>

The behavior that is permissible in a club depends on the local or state law.<sup>94</sup> Some cities or states require that the male patrons stay a particular distance from the exotic dancer if she is not wearing particular articles of clothing;<sup>95</sup> others ban lap dancing;<sup>96</sup> others, like Las Vegas, permit lap dancing but have specific anti-touching rules regulating lap dances.<sup>97</sup> Still others permit at least some sexual contact.<sup>98</sup> When performing a lap dance the "dancer sits either between her customer's legs or directly on his lap with her tailbone pressed up against his genitals, moving her body against the customer's in order to arouse him."<sup>99</sup>

In *Dancing for Dollars and Paying for Love: The Relationship Between Exotic Dancers and Their Regulars*,<sup>100</sup> sociologist and former exotic dancer Danielle Egan explains the complex relationships that exist between regular customers and the dancers in a club that offers lap dances. Egan danced at two strip clubs in New England.<sup>101</sup> She developed close relationships with a number of regulars and with the other dancers during this period. She observed that the dancers performed significant emotional labor, including acting interested and supportive and creating a comfortable environment for their clients.<sup>102</sup> This emotional labor, which she describes as more tiresome than the work of exotic dance,<sup>103</sup> is crucial to the financial success of the dancer.<sup>104</sup> The dancer uses

93. *Id.*

94. R. DANIELLE EGAN, *DANCING FOR DOLLARS AND PAYING FOR LOVE: THE RELATIONSHIPS BETWEEN EXOTIC DANCERS AND THEIR REGULARS* 12 (2006).

95. This is the rule in many California locations. Men are required to stay at least six feet away from women in clubs who are not wearing tops. Interview with Jordan, *supra* note 81. See also Susan Bremer, *The Grind*, in *FLESH FOR FANTASY: PRODUCING AND CONSUMING EXOTIC DANCE* 35, 39 (R. Danielle Egan et al. eds., 2006) (stating that a local law required that men stay six feet away from topless dancers because the club served alcohol).

96. See Jacqueline Lewis, *Controlling Lap Dancing: Law, Morality, and Sex Work*, in *SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY* 203, 207 (Ronald Weitzer ed., 1999) (discussing proposed Toronto ordinance that would prohibit lap dancing in strip clubs).

97. Jordan notes the host of changing ordinances passed by the city council in Las Vegas. As bouncers and entertainers enter the Las Vegas clubs, they are often informed of new "rules" imposed on the club. A proposed rule required men receiving lap dances to sit on their hands. Interview with Jordan, *supra* note 81; see also EGAN, *supra* note 94, at 16.

98. In one state, for example, the strip clubs permit customers to watch the dancers enact live pornographic scenes. When the rules become either too permissive or too strict, dancers move to another state or locale to perform. Interview with Jordan, *supra* note 81.

99. See Lewis, *supra* note 96, at 203. In some clubs, the behavior approaches prostitution and goes beyond that described above. For example, a two-month undercover investigation in Toronto in 1991 revealed that some lap dances included "reaching into [a patron's] crotch and apparently masturbating him," "permitting the customer to touch and fondle [the dancer's] breasts, buttocks, thighs, and genitals," "permitting the customer to kiss, lick and suck their breasts," and "permitting what appeared to be cunnilingus." *Id.* at 207 (citation omitted).

100. EGAN, *supra* note 94.

101. *Id.* at 14-15.

102. *Id.* at 41-42.

103. *Id.* at 110.

104. *Id.* at 41.



emotional labor to develop clients into “regulars” who spend hundreds of dollars at each visit to the club.<sup>105</sup> The emotional labor, which is invisible to the regular clients,<sup>106</sup> results in the clients’ belief that they are “boyfriends” rather than customers.<sup>107</sup> In response, the customers perform “emotional consumption,” an “affective relation that emerges *within* social interaction.”<sup>108</sup> Many of the clients speak of their dancers in terms of a love relationship and repeatedly ask the dancers to go out with them outside of the club.<sup>109</sup> In order to maintain the fantasy and keep the regular client’s business, the dancers spend considerable effort responding to cell phone calls and e-mail messages from their regular clients.<sup>110</sup> While they do not agree to meet their customers outside of the club, they leave the possibility open, telling the regular that they are too busy at the time.<sup>111</sup> Ultimately, the regular often poses an ultimatum to the dancer that she either go out with him outside of work or he will not return.<sup>112</sup> When the dancer fails to submit to the regular’s wishes, his response is grief and rage.<sup>113</sup>

To maintain this fantasy, the club walks a fine line between permitting the customers to believe that the exotic dancers are completely available to the customers and protecting the dancers from sexual harassment and criminal assault. While in the context of a strip club the employer has an interest in maintaining the fantasy, it has a duty to respond to unacceptable behavior immediately when it occurs.

Ordinarily, according to Frank and Egan, regular customers pose little or no threat of sexual harassment.<sup>114</sup> Egan notes that “cursory” customers<sup>115</sup> do, however, make many dancers uncomfortable and can create a harassing environment.<sup>116</sup> She notes that dancers often perceive lap dancing with regulars as pleasurable because the women feel powerful, but “lap dancing was also considered ‘gross,’ ‘difficult,’ and ‘disgusting’ for most dancers. Usually associated with cursory customers, ‘gross’ situations were ones that crossed the line of acceptable behavior (actions ranging from unwanted grabbing of a

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105. *Id.* at 107.

106. *Id.* at 43, 133.

107. *Id.* at 115.

108. *Id.* at 125-27, 126.

109. *Id.* at 118-19.

110. *Id.* at 72, 118.

111. *Id.* at 67-69.

112. *Id.* at 118.

113. *Id.* at 119.

114. Frank told me that she experienced more customer harassment when she waited tables in ordinary restaurants than she did as an exotic dancer in a club. Interview with Katherine Frank in Las Vegas, Nev. (Mar. 13, 2006). See also EGAN, *supra* note 94, at 113 (observing that regulars see their time in the lap dance room as intimate, special, and posing few problems for the dancers).

115. This is the term Egan uses for persons who do not go to the clubs regularly. See EGAN, *supra* note 94, at 133.

116. *Id.* at 113. See also Shelly Manaster, *The Lap Dancer and the “Business Man,”* in FLESH FOR FANTASY: PRODUCING AND CONSUMING EXOTIC DANCE, *supra* note 95, at 58-59 (describing a physical and verbal assault by a customer).

dancer's body to men *literally* feeling orgasm)."<sup>117</sup> While regulars ordinarily do not harass dancers, once denied an "outside" relationship with the dancer, regulars are potentially dangerous harassers against whom the dancer may need protection. Egan describes one regular who, once rebuffed, yelled obscenities at his dancer; another told the management that she prostituted herself.<sup>118</sup>

Exotic dancers use self-help to control the unwanted behavior of customers. They avoid contact with patrons while dancing by slapping or grabbing customers' hands, altering their dance tempo to avoid being touched, and evoking club rules against touching.<sup>119</sup> When a dancer cannot control the customer, she relies on the bouncers to stop the harassment.<sup>120</sup>

Even in a strip club where the business tolerates and promotes behavior and speech that would be highly offensive in an office atmosphere, behavior occurs that constitutes sexual harassment as to some employees but not others. Drawing the line is complicated in part because men report that they visit gentlemen's clubs in order to escape the "PC" world of strained relations between men and women and the fear that they will offend women at work by something they do or say.<sup>121</sup> Nonetheless, this function of the gentlemen's club should not absolve the customer of harassing behavior that the dancer and the management have made clear is inappropriate.

Some men experience the clubs as a means of competing with one another to prove their masculinity.<sup>122</sup> This competition can lead to harassment. While Frank herself encountered no significant problems with harassment or aggression by regular customers, she was aware that other dancers in other clubs suffered harassment.<sup>123</sup> Frank reports that men who visit the clubs in large groups often talk about dancers in more demeaning and sexualized ways than men who visit alone. This talk becomes part of a competition to prove masculinity.<sup>124</sup>

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117. EGAN, *supra* note 94, at 113.

118. *Id.* at 119.

119. See Burstein, *supra* note 20, at 302-303; Lewis, *supra* note 96, at 205.

120. See generally JORDAN, *supra* note 85.

121. FRANK, *supra* note 81, at 94-97. "PC" is the abbreviation for "politically correct."

122. *Id.* at 64-65, 111-12.

123. *Id.* at 155.

124. *Id.* at 112. Frank noted, however, that she was surprised at how "civilized" and polite the transactions between the men and women were. She questioned whether this behavior would be the same in a club that permitted lap dances. *Id.* at 151. Jordan, who worked in clubs where lap dances were performed, saw much rowdier behavior than that experienced by Frank, but it is unclear whether this was caused by lap dances, Las Vegas, or some other reason. JORDAN, *supra* note 85, at 160-61 (describing the sexual assault of a dancer). Frank and Egan posited at a talk in Las Vegas that a tourist town like Las Vegas may have rowdier behavior in its clubs. Katherine Frank and Danielle Egan, Producing and Consuming Sexual Desire, at the University of Nevada, Las Vegas (Mar. 9, 2006).

#### 4. Brothel Prostitutes

Prostitution is legal in counties in Nevada with a population of fewer than 400,000 people.<sup>125</sup> In Clark and Washoe Counties, where Las Vegas and Reno are located, prostitution is illegal. Most regulation of Nevada brothels is county-wide or local. Brothels in Nevada range from fairly fancy large establishments with up to eighty working prostitutes to smaller ones with only one or two prostitutes. The smaller brothels are either old-fashioned and cozy or run-down.<sup>126</sup> Many brothels are arranged with a parlor and bar (the public area) and hallways with bedrooms for the prostitutes' work. They also include private areas where the prostitutes rest during off-work time.<sup>127</sup> Other brothels are "bar houses" with five or fewer prostitutes.<sup>128</sup> At the bar houses, the prostitutes hustle customers at the bar instead of appearing for a "line-up" as do the prostitutes in the parlor houses. Prostitutes ordinarily work for a period of time from a few days to three weeks straight.<sup>129</sup> Over the course of a year, Nevada brothel prostitutes work from approximately one month to six months.<sup>130</sup> Historically, cities and counties with brothels had "lockdown" codes forbidding prostitutes from leaving the premises during their stays. While this custom is changing, a number of brothels do not permit prostitutes to return home or go into town during the period of days or weeks that they work.<sup>131</sup> Brothels do not want the prostitutes to "turn tricks" on the side during their work weeks.<sup>132</sup> Moreover, the presence of the brothels is less problematic for the locals if the prostitutes are not seen on the local streets or in shops, restaurants, or bars. Some towns have worked with local police to keep prostitutes off the streets and some brothels require prostitutes to be accompanied by an escort.<sup>133</sup> Even though legalized prostitution is accepted and even condoned by residents because the brothels are good for the local economy, the prostitutes are stigmatized and prostitution is hidden.<sup>134</sup>

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125. NEV. REV. STAT. ANN. § 244.345(8) (LexisNexis 2005).

126. Interview with Barb Brents and Kate Hausbeck, authors of *THE STATE OF SEX: THE NEVADA PROSTITUTION INDUSTRY* (forthcoming), in Las Vegas, Nev. (Feb. 2, 2006). Brents and Hausbeck are sociology professors at the University of Nevada, Las Vegas, who have spent three years interviewing over forty prostitutes and twenty managers, owners, and other workers in Nevada brothels.

127. See ALEXA ALBERT, *BROTHEL: MUSTANG RANCH AND ITS WOMEN* 13-19 (2001).

128. See LORA SHANER, *MADAM: INSIDE A NEVADA BROTHEL* 27-28 (1999).

129. ALBERT, *supra* note 127, at 48.

130. Interview with Brents and Hausbeck, *supra* note 126.

131. See ALBERT, *supra* note 127, at 25, 48-49; Kathryn Hausbeck and Barbara G. Brents, *Inside Nevada's Brothel Industry*, in *SEX FOR SALE: PROSTITUTION, PORNOGRAPHY AND THE SEX INDUSTRY*, *supra* note 96, at 231-32; Interview with Brents and Hausbeck, *supra* note 126.

132. See ALBERT, *supra* note 127, at 48.

133. *Id.* at 48-49.

134. For example, brothels are prohibited from advertising. NEV. REV. STAT. ANN. §§ 201.430, .440 (2005). The Nevada Supreme Court has upheld this prohibition. *Princess Sea Indus., Inc. v. State*, 97 Nev. 534 (1981).

Prostitutes at the larger brothels ordinarily work twelve-hour shifts<sup>135</sup> and service an average of approximately six customers during this period, at a range of approximately \$150-\$500 each.<sup>136</sup> The number of customers is lower in the smaller brothels.<sup>137</sup> In most brothels, prostitutes give 50% of the proceeds earned from customers (including the tips earned) to management and are charged for room and board and tips for brothel employees.<sup>138</sup> Furthermore, for those brothels relying on taxi and limousine service to bring customers, prostitutes are expected to pay cab drivers a percentage for bringing the johns to the brothel.<sup>139</sup>

In "parlor houses," when a man enters the public area, the house manager or madam calls a line up of the working women.<sup>140</sup> As the women, dressed in alluring clothing, pose for the man, he selects a woman, and they retreat to her room where they negotiate a price for the services he desires.<sup>141</sup> The prostitute actively engages the john in negotiating the specific sex acts she is to perform and the cost of those acts.<sup>142</sup> The rooms have intercoms so that the cashier or madam can eavesdrop on the negotiations to assure that the prostitute does not cheat the house out of its share or deal drugs.<sup>143</sup> If the prostitute and the john cannot reach an agreement, the prostitute escorts him back to the main parlor where he is free to negotiate with another prostitute for services.<sup>144</sup> After agreeing with the man about the price, the prostitute collects the money and inspects the john's penis, washing it with warm water.<sup>145</sup>

135. ALBERT, *supra* note 127, at 55. At the smaller brothels, prostitutes work thirteen- or fourteen-hour shifts from noon to 1 or 2 A.M.

136. *Id.* at 20. This amount may vary dramatically depending on the brothel and the prostitute. Estimates of yearly incomes (for three to six months of work) vary from \$10,000 to \$100,000. Interview with Brents and Hausbeck, *supra* note 126. Prostitutes make more money at the bigger, fancier brothels. *Id.*

137. Interview with Brents and Hausbeck, *supra* note 126. Brents and Hausbeck spent the night at one small brothel that had only one prostitute working. She had three customers that evening.

138. ALBERT, *supra* note 127, at 50-52.

139. *Id.* (explaining that, at the Mustang Ranch, the cab drivers received 20% of the receipts earned by the brothel and the prostitute, receiving 10% from the brothel and 10% from the prostitute); SHANER, *supra* note 128, at 3-4 (noting that limo and cab drivers get one-third of the take from the customers they bring to Sheri's Ranch in Pahrump). The brothels that are closer to cities rely more on tourists for customers who are brought by cabs and limousines, whereas the brothels in more remote areas serve truckers and locals. Interview with Brents and Hausbeck, *supra* note 126.

140. SHANER, *supra* note 128, at 28-30. In the smaller brothels, there may not be a line-up. Instead, the prostitutes mingle with patrons at the bar. *Id.* at 27-28; Interview with Brents and Hausbeck, *supra* note 126.

141. ALBERT, *supra* note 127, at 18-20, 50.

142. SHANER, *supra* note 128, at 6-7.

143. ALBERT, *supra* note 127, at 50. *See also* SHANER, *supra* note 128, at 34 (explaining that madams listen in to prevent the prostitute from taking drugs or skimming off payment from the brothel and to protect the prostitute from the man); Interview with Brents and Hausbeck, *supra* note 126. While most brothels prohibit the use of illegal drugs by prostitutes, some prostitutes do use illegal drugs.

144. ALBERT, *supra* note 127, at 21. Brents and Hausbeck explained that prostitutes told them that they may reject a customer because of his race, his desire for anal sex or sadomasochism, obnoxious behavior, or evidence of disease on his penis. Interview with Brents and Hausbeck, *supra* note 126.

145. Interview with Brents and Hausbeck, *supra* note 126.

Besides limiting the freedom of prostitutes to leave the premises, the brothel management strictly controls the prostitutes' behavior while on the premises. During negotiations, the women are told to turn off all radios, fans, and other devices that might cover the voices of the prostitute and john. Moreover, the management in at least some of the brothels conducts unannounced searches of the women's rooms to check for drugs and additional cash that was not shared with management.<sup>146</sup>

Despite these strict controls over the prostitutes' freedom of movement and the relative lack of privacy, the brothels characterize the prostitutes as independent contractors rather than employees and do not provide employee benefits such as health insurance, pensions, disability, or workers' compensation.<sup>147</sup> Since the determination of whether a person is an independent contractor or employee rests on the amount of control that the company has over the workers, this legal categorization is questionable.<sup>148</sup>

Prostitutes' jobs are more varied than outsiders think. While prostitutes perform sexual acts for pay, and some of them enjoy the sexual contact,<sup>149</sup> their jobs include gendered behavior that goes beyond simple sex. Brothel prostitutes describe their jobs as "healing jobs," explaining that sex is a tool that helps a patron access his emotions.<sup>150</sup> If they were not prostitutes, many of them state that they would like to be social workers, nurses, teachers, or day care professionals.<sup>151</sup> Many prostitutes speak of the "sweet old guys" whom they service. These johns are ordinarily older men, some of whom are recently widowed. Often these men want to do nothing other than talk.<sup>152</sup> Lora Shaner, who served as a madam at Sheri's Ranch in Pahrump, Nevada,<sup>153</sup> about sixty-five miles from Las Vegas, confirms that prostitutes often serve the function of confidant and non-judgmental listener whose role is to boost the fragile egos of the men who visit them.<sup>154</sup> They service men who otherwise would not have an

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146. See ALBERT, *supra* note 127, at 50.

147. See ALBERT, *supra* note 127, at 50-51; Barbara G. Brents & Kathryn Hausbeck, *State-Sanctioned Sex: Negotiating Formal and Informal Regulatory Practices in Nevada Brothels*, 44 SOC. PERS. 307, 325-26 (2001).

148. See *supra* note 81. Assuming that the brothel has sufficient employees to qualify as an "employer" under Title VII (i.e., fifteen), there is a good argument that brothel prostitutes who work the required number of days per year are employees because they lack control over their work environments, hours, and locations. See ALBERT, *supra* note 127, at 47-51, 83 (describing the strict control brothels had over the prostitutes, including confinement for weeks and prohibition from using the telephone on Saturday evenings); Brents & Hausbeck, *supra* note 147, at 325-26 (noting that most brothels require prostitutes to live on the premises, and that the larger houses have more bureaucratic regulations including severe restrictions on mobility, work hours, and time off).

149. See generally MICHELLE MAVERICK, *DIARY OF A LEGAL PROSTITUTE: NEVADA BROTHELS* (2004); SHANER, *supra* note 128, at 87.

150. See ALBERT, *supra* note 127, at 105. Prostitutes regularly characterize their work as "therapy." Interview with Brents and Hausbeck, *supra* note 126.

151. See ALBERT, *supra* note 127, at 105.

152. Interview with Brents and Hausbeck, *supra* note 126.

153. See SHANER, *supra* note 128, at 1-2.

154. See *id.* at 81, 148, 194.

opportunity for sexual contact with another human being, such as a dying, quadriplegic seventy-six-year-old World War II veteran.<sup>155</sup> Prostitutes also service men who need physical connection but who do not want a burdensome relationship outside of the brothel.<sup>156</sup>

Prostitutes, according to Brents and Hausbeck, do not discuss the more aggressive johns. The prostitutes may be subject to aggressive behavior but reluctant to discuss it, or little aggressive behavior may occur. While explaining that there have been "incidents" at some brothels, prostitutes generally state that they feel secure and that their working environment is relatively safe.<sup>157</sup> However, Brents and Hausbeck met one woman who had her larynx fractured by a drunk patron who choked her.<sup>158</sup> Lora Shaner, the madam at Sheri's Ranch, also witnessed a few violent incidents in the brothel.<sup>159</sup>

Nonetheless, given that the walls in the brothels are very thin, Brents and Hausbeck believe it is unlikely that others in the building would not hear unwanted aggressive behavior.<sup>160</sup> Rooms in most of the brothels also have "panic buttons" that the prostitutes can push for immediate help if necessary.<sup>161</sup> It appears that most prostitutes in Nevada brothels feel relatively safe,<sup>162</sup> but this safety often comes at the expense of the prostitutes' freedom of movement.<sup>163</sup>

Because the essence of the business and the prostitutes' role in the business is selling sexual acts to customers, sexual harassment will depend in large part on the negotiations and behavior agreed upon by the prostitute and the john. A patron who goes beyond the agreed-upon sex, however, could potentially expose the prostitute to sexual harassment even in the bedroom. Outside of the bedroom but still inside the brothel, the brothel owner has the ability to protect the prostitutes from unwelcome sexual harassment. Brents and Hausbeck believe that this behavior is more likely to occur in brothels that do not conduct line-ups but instead have prostitutes mingle with patrons at the bar.<sup>164</sup> Management's duty could extend to protection of prostitutes from harassing

155. See *id.* at 86, 250 (describing a prostitute who demonstrated compassion for men who were disabled, disfigured, grotesque, incontinent, or paralyzed).

156. *Id.* at 200.

157. See Barbara G. Brents & Kathryn Hausbeck, *Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy*, 3 J. INTERPERSONAL VIOLENCE 270, 287-289 (2005). Shaner notes that one of her prostitutes told her that the johns in brothels are docile, unlike the customers of streetwalkers who often become violent after sex. See SHANER, *supra* note 128, at 148.

158. See Brents & Hausbeck, *supra* note 157, at 289.

159. See SHANER, *supra* note 128, at 88-90, 227.

160. Interview with Brents and Hausbeck, *supra* note 126.

161. See Brents & Hausbeck, *supra* note 157, at 280.

162. The relative safety may be in comparison to streetwalkers, who live in dangerous conditions. *Id.* at 287-89.

163. *Id.* at 284-85. A significant minority of brothel prostitutes also work either for pimps—men who exploit the women for money—or for "husband" or "boyfriend" pimps, who benefit from the women's earnings. SHANER, *supra* note 128, at 42-44. Nevada law prohibits pimping. NEV. REV. STAT. ANN. §§ 201.295, .300, .310, .320 (2005).

164. Interview with Brents and Hausbeck, *supra* note 126.

phone calls and behavior that goes beyond the sex acts for which patrons contract and pay.<sup>165</sup>

#### *D. Comparing Sexual and Gendered Job Expectations*

The job of blackjack dealer, performed by both men and women, has no sexual content, but at the Hard Rock, women dealers work in a sexualized environment. This environment primes the male customers to expect women dealers to cater to the men's need for reinforcement of their masculinity through sexual gratification or the disparagement of women.

A woman blackjack dealer must enact certain gendered behaviors—emotional labor—or pay the price for not doing so. These behaviors include smiling, acting friendly toward customers, and flirting with them even as they harass her. If she does not perform this gendered behavior, she may suffer less favorable treatment. My Hard Rock study revealed, for example, that coworkers and management considered a woman dealer who was an excellent card player an “ice queen” because she refused to smile at customers who made sexual remarks to her. This reputation negatively affected her assignments.<sup>166</sup>

Although the job of blackjack dealer calls on the woman dealer to enact less sexual (“bad girl”) behavior with her patrons, and it requires some gendered (“good girl”) behavior such as smiling and acting friendly, it requires much less “good girl” emotional labor than the prostitute's job. Unlike the prostitute, who plays the soothing roles of nurse and psychologist as well as sex partner, the dealer has a competitive relationship with the blackjack player. This competition leaves her vulnerable to the player's anger if he begins to lose because she disturbs the traditional role of compliant female. Her breaking of this gender stereotype renders her a “bad girl”<sup>167</sup> who has emasculated the losing player and who deserves punishment for not adhering to more acceptable traditional female behavior.

Serving cocktails, like dealing blackjack, has no sexual content. Men could perform the job tasks of taking orders and delivering the drinks to the customers. In Las Vegas casinos, however, the job is sexualized. Only women are hired to perform this job, and increasingly the casinos require younger women who show off their bodies in skimpy costumes. Some casinos have made this sexual role explicit by changing the title of the cocktail waitresses to

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165. This duty may extend beyond the gates of the brothel, depending on the fact situation. For example, some brothels permit their prostitutes to go out on dates with their customers while working. See Brents & Hausbeck, *supra* note 147, at 326. A prostitute should be protected from sexual harassment during these dates as well as from harassment occurring at the brothel.

166. McGinley, *supra* note 8 (manuscript at 9-14).

167. See *supra* Part II.A (explaining my use of the term “bad girl” to describe a woman who does not conform to the expected behavior or norms of her gender).

"bevertainers"<sup>168</sup> or by requiring women employees to sign agreements requiring monthly weigh-ins and suspension if they exceed certain weight limits.<sup>169</sup> Unlike the prostitute, the cocktail waitress does not sell sexual services outright; nonetheless, she trades on her sex appeal more than the blackjack dealer does by wearing a revealing costume and molding her body through plastic surgery. The cocktail waitress is presumed to be a "bad girl" because she willingly flaunts her sexuality. However, the cocktail waitress also acts as a "good girl" when she enacts traditional gendered behavior by serving the man his drinks and making him comfortable. Because it requires simple surface acting, the emotional labor involved is less extensive and more transitory than a prostitute's. Unlike the blackjack dealer, the cocktail waitress does not upset traditional notions of gender by competing with her customers. Instead, she consistently shows her compliance through service with a smile and friendly behavior.

Unlike the jobs of blackjack dealer and cocktail waitress, the job of exotic female dancer in a gentlemen's club has sexual content; while some exotic dancers are reluctant to consider themselves sex workers,<sup>170</sup> there is no question that the job performed by exotic dancers has a sexual component lacking in the jobs of blackjack dealers and cocktail servers. The dancers, unlike the dealers and cocktail servers, expose intimate body parts to the clientele, and many perform lap dances in which they sexually stimulate patrons. The job, however, is more than "just sex." It requires a dancer to perform emotional labor by offering to the patron, at least for a few moments, the fantasy that he is handsome, important, sexy, and powerful—a feeling of acceptance and caring.<sup>171</sup> Moreover, many dancers develop regular customers who talk about their wives and children, their problems, and their sexual fantasies. The dancers demonstrate empathy and understanding to these clients, and their attention boosts the ego of the client.<sup>172</sup>

Brothel prostitutes engage in sexual acts with clients for a fee. Like the exotic dancers, prostitutes create a fantasy for their clients.<sup>173</sup> Although the prostitute's job involves the most blatant sale of sexual services, she also performs emotional labor that goes beyond the sale of sex in her dealings with her johns. Like a nurse or psychologist, the prostitute listens to clients and builds them up, making them believe in their self worth. She engages in

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168. See Rod Smith, *Don't Mean a Thing if it Ain't Got That Sing*, LAS VEGAS REV.-J., Sept. 4, 2003, at 1D (observing that the casinos are replacing unionized cocktail servers with non-unionized "bevertainers" whose job is to entertain while serving drinks); Rod Smith, *Rio to Replace Cocktail Servers*, LAS VEGAS REV.-J., Feb. 20, 2003, at 1A.

169. Interview with cocktail waitress, in Las Vegas, Nev. (May 26, 2005).

170. See Interview with Jordan, *supra* note 81.

171. See EGAN, *supra* note 94, at 40-46; JORDAN, *supra* note 85, at 143-47.

172. See EGAN, *supra* note 94, at 106.

173. See SHANER, *supra* note 128, at 240-51.



“surface acting,” pretending that she receives sexual pleasure from the encounter.<sup>174</sup>

The common thread among these jobs is that either the job or the environment in which the job is performed is sexual. All of these women either trade on their sexuality or sell sex outright at work. But sexuality is not the only job requirement. Each job has other requirements, some gendered and some not. Moreover, in varying degrees, all four of the jobs require the worker to compromise her own emotional independence and to engage in emotional labor, managing the emotions of the customers to elicit a certain response. While differing in intensity and degree of managerial supervision, this emotional labor resembles the behavior expected of the flight attendants, fast food workers, insurance salesmen, and paralegals studied by Hochschild, Leidner, and Pierce. Requiring emotional labor in service jobs blurs the line between jobs in sexualized industries and those in non-sexualized industries.

The content of the four jobs reveals the fallacy of the “good girl”/“bad girl” dichotomy, because all four jobs require behavior that falls into both categories if we expand the definition of good and bad girls to include gendered behavior as well as sexual behavior. Moreover, the greater the sexual content of the job (i.e., it is a job for “bad girls”), the more gendered non-sexual behavior is required (i.e., it is a job for “good girls”). This non-sexual, gendered behavior includes serving, soothing, calming, taking care of a man’s physical needs other than sex, caring for the man’s psychological needs, and elevating the man’s self-esteem. Society condones this behavior as fulfilling the proper role of women when it is enacted in one’s personal life and often expects it of women in their work lives. While there exist serious questions as to the legality under Title VII of requiring gendered emotional labor in a job where the behavior is not essential to the performance of the job and to the business itself, there is no question that this behavior is required of women working in non-sexualized jobs.

### III. ADAPTING TITLE VII TO SEXUALIZED INDUSTRIES

#### *A. Rationale for Protecting Sex(y) Workers from Harassment*

The description of jobs in sexualized industries raises policy questions concerning the scope and application of Title VII. The threshold question is whether the statute should protect any women who work in sexualized environments from harassment by customers. If the statute protects some women working in sexualized industries, the second issue is how to determine

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174. See HOCHSCHILD, *supra* note 28, at 35-38.

which women to protect. The final question is what standards should apply to sexual harassment lawsuits brought by employees in sexualized workplaces. The next two Subsections deal with the first two questions. Section B of this Part discusses the applicable standards.

### *1. Title VII Protection of Sex(y) Workers*

Following Cahill's suggestion, society could refuse to protect any of the women working in the four jobs described because they all trade on their sex or sell sex outright. This argument to absolve the employer of all liability for customer behavior in sexualized industries proceeds as follows. Because women performing these jobs either knew or should have known of the sexualized environment in which they would work at the time they accepted their jobs, they assumed the risk of unwelcome customer behavior and therefore waived the right to protection from harassment. Their employer, in turn, has no duty to act non-negligently toward them because the dangers of the jobs are open and obvious.<sup>175</sup> Moreover, the women receive "combat pay" in the form of tips for the sexual component of their jobs.

Casinos, gentlemen's clubs, and brothels could use Cahill's assumption of risk rationale to defend against sexual harassment suits by women employees by arguing that the women's agreement to work in jobs posing open and obvious dangers of sexual harassment relieves the employers of the duty to prevent and/or to correct customer harassment.<sup>176</sup> The defense, however, tends to discriminate among women based on their class. Women who have no access to wealth, education, or well-paying jobs may be forced for financial reasons to work in jobs requiring that they openly sell their sexuality, while women with access to education, lucrative jobs, or men with well-paying careers are not faced with the choice between low-paying jobs and selling their sexuality. If limited to jobs in which sex appeal is for sale, the assumption of risk defense will disproportionately harm women with access to fewer resources.

Moreover, use of the assumption of risk defense penalizes women who display their sexuality by assuming that once the woman wears the outfit of a temptress or works in a sexualized job, she invites men to grab her and to make lewd comments to her. The victim of the sexual harassment becomes the

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175. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68 (5th ed. 1984) (describing assumption of risk defense).

176. Cahill might conclude that this defense does not apply to dealers at the Hard Rock because they do not work in jobs in which sex appeal plays a substantial role. See generally Cahill, *supra* note 12, at 1133-44 (describing situations in which assumption of risk defense should be available). However, others might extend the argument to all women working at the Hard Rock.

“cause” and is blamed for the harassment.<sup>177</sup> In fact, she deserves what she gets. A policy that distances the “good girls” from the “bad girls” is profoundly destructive.<sup>178</sup> Such a distinction dehumanizes women working in sexualized industries by assuming that, because they earn a living by trading on their sex appeal or engaging in specific sexual behavior, they waive the right to protection from other forms of degrading sexual violence or abuse. Moreover, advocacy of the assumption of risk defense fails to recognize that employers whose businesses rely on the display of masculine practices consciously create and benefit from an environment in which harassment is likely to occur.

Dividing women by their job choices ignores the reality that virtually all women workers experience commodification<sup>179</sup> of their sexuality or gender,<sup>180</sup> and disregards the women’s reasons for working in highly sexualized environments, their job responsibilities and expectations, and the employer’s role in fostering the harassment.<sup>181</sup> This argument relies on a punitive attitude toward women who choose to work in sexualized environments, and fails to recognize these women’s realities. By assigning to these women the status of “bad girl” for their work choices, it places on women the responsibility of regulating the sexualized aggression of heterosexual men without placing any responsibility on the individual men, on the employer, or on society in general. My study of women blackjack dealers at the Hard Rock demonstrated that such assignment of responsibility places a heavy burden on women, one that is skewed against women of the middle and lower working classes. Many women choose these jobs because they provide the women and their families necessary financial support. The jobs permit these women, many of whom do not have college educations or partners with significant incomes, to earn considerably higher incomes than would the alternatives available to them.<sup>182</sup>

Permitting an assumption of risk defense would significantly undermine Title VII by placing the risk of harassment on the victim rather than on the employer, who has more opportunity to prevent and remedy the harassment,

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177. See, e.g., *Perkins v. Spivey*, 911 F.2d 22, 32 (8th Cir. 1990) (refusing, under Kansas law, to hold that the plaintiff had assumed the risk of being raped at work in a negligent hiring and retention case).

178. See Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 *YALE J.L. & FEMINISM* 47, 118-20 (1992).

179. “Commodification” means the selling of one’s sex or sex appeal for money. As I use it here, it also refers to conforming to gendered expectations for money. For interesting discussions of commodification, see generally *RETHINKING COMMODIFICATION*, *supra* note 47.

180. As I use the term, “gender” is a socially constructed phenomenon that assumes that particular behavior follows from biological sex. Thus, if the biological sex of a person is female, her “natural” gender is feminine. If the biological sex of the person is male, his “natural” gender is masculine. From this notion of gender, society constructs concepts regarding the proper gender roles of persons within society. For more discussion of “gender,” see McGinley, *supra* note 9, at 368-70.

181. See McGinley, *supra* note 8 (manuscript at 8-9, 11-26) (describing the reasons women work as blackjack dealers at the Hard Rock and the role the casino’s advertising, promotions, and disregard for harassment play in encouraging harassment).

182. *Id.* at 8-9. See also JORDAN, *supra* note 85, at 67-70.

and by ignoring the systemic and cultural causes of the harassment. While the context of sexualized work environments is significantly different from non-sexualized work environments, Title VII should account for this context in determining whether a hostile work environment exists, rather than rejecting a cause of action altogether. Allowing an assumption of risk defense against women who are harassed in sexualized environments would also lead to fewer protections for women in non-sexualized environments. Once the defense applies to discrimination in sexualized environments, it could logically apply to sexual or racial harassment cases in companies that permit their employees to harbor and act upon discriminatory attitudes, because an employee who knowingly accepts a job in such a racist or sexist environment also assumes the risk of racial or sexual harassment. This use of the assumption of risk defense would clearly undermine the purposes and policies of Title VII.

Finally, a women's earning of increased income in tips should not deprive her of the protections that Title VII affords all members of protected classes: the right to work in an environment that is free of discriminatory harassment. There is little doubt that the employer in sexualized environments also earns a greater income because of that environment, and that the employer both creates the environment and is in a better position to prevent and remedy harassment. In these industries, employers hire security personnel to keep businesses safe for customers. In the casinos, cameras are monitored to protect the owners from fraud by employees and clientele, and multiple layers of supervisory employees watch the gaming tables. In the gentlemen's clubs, bouncers often protect employees from overly aggressive customers. In the brothels, male bartenders and other employees serve as security for the women workers and maintain a close connection to local police.<sup>183</sup> Because these measures are already in place, providing protection to women employees from sexual harassment would be inexpensive and effective. Thus, the employer should bear the responsibility of the risk just as employers in other industries do. To do otherwise would grant a windfall to the employer.

## *2. Choosing Which Workers to Protect*

Given that recognition of the assumption of risk defense in all cases of sexualized workplaces is not an attractive option, a second choice is to protect only the blackjack dealer. This job, unlike the other jobs described, does not require the worker to perform sexual services or to wear a suggestive, skimpy costume that invites harassment. The dealer's only fault is that she works in an environment where the patrons are drunk and the attitude toward women is discriminatory and lecherous. Moreover, because the dealer shares her tips with the men dealers, a failure to recognize a cause of action for sexual harassment

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183. See SHANER, *supra* note 128, at 7, 63-66; Brents & Hausbeck, *supra* note 157, at 281-82.

would subject her to unequal treatment. Unlike the men dealers, the woman dealer would have to endure sexual harassment to earn the same amount in tips. In essence, the woman's submission to sexual harassment would subsidize the men dealers. One problem with using this rationale to distinguish the dealer from other women working in sexualized jobs, however, is that it would provide a remedy only to those women working in jobs performed by both men and women and neglect women working in jobs that are segregated. Job segregation, however, is an important source of discrimination against women<sup>184</sup> and should not excuse discrimination.

Another approach would be to draw a line between the women who sell sex appeal—the dealer and cocktail waitress—and the women who sell sex—the exotic dancer and the prostitute. Because neither the dealer nor the cocktail waitress sells sexual services and their jobs do not include sexual entertainment, one could argue that they should be protected from sexual harassment while the women who perform exotic dances and sell their bodies as prostitutes should not. Although exotic dancers and prostitutes knowingly engage in behavior that subjects them to a greater risk of sexual harassment, this fact is insufficient to deprive them of the protection of the statute. Taken to its logical conclusion, this argument would necessarily apply to women working in male-dominated sexist environments and to men and women of color working in racist environments. By deciding to work in those environments, the women and men knowingly engage in behavior that increases the risk of harassment caused by their gender or their race. To punish risky behavior would discourage women and persons of color from working in professions and industries that are sexist and racist, limiting their abilities to gain equal employment.

The difficulty of defining behavior that creates a hostile work environment for the dancers and brothel prostitutes also supports a distinction between women who sell sex appeal and those who sell sex. However, fact finders make difficult factual distinctions on a daily basis in the courts, and with proper instruction would be able to do so in these cases.

Finally, Meg Baldwin has demonstrated the destruction caused by feminists' abandonment of the interests of women who are prostituted.<sup>185</sup> Abandoning prostitutes and exotic dancers reinforces the concept of deserving and non-deserving women and undermines the moral authority of all women who argue for equal treatment.

The final possibility is to protect women in all four job categories from sexual harassment. This proposal is justified for a number of reasons. First, the

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184. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2066, 2140 (2003) (demonstrating that workers are more likely to be harassed where horizontal or vertical segregation occurs).

185. See generally Baldwin, *supra* note 178.

descriptions of the jobs these women perform demonstrate that drawing lines between them is difficult. Each job comprises sexual and non-sexual elements. While the prostitute sells sex, she also engages in stereotypically gender-based behavior that is similar to the job of nurse or psychologist. While the cocktail waitress performs a non-sexual job—serving drinks—she also flaunts her sexuality in order to earn greater tips. The exotic dancer engages the patron in a sexual fantasy, but she also works to raise his self-esteem, a gender-based task that many women are expected to do in traditional jobs and relationships. The blackjack dealer competes with the patron over cards, but she also smiles and occasionally flirts with the patron. Separating these women from one another distorts the reality that each job has sexual and non-sexual, as well as gendered and non-gendered, components.

Moreover, it is difficult to draw a line between these four jobs and other jobs women perform in non-sexualized industries. As explained in Part II.D, nearly all jobs require some commodification of gender or sexuality. While men's clothing requirements denote power, women's dress requirements regulate or emphasize the display or repression of women's gender or sexuality. Women serving in jobs as administrative assistants, lawyers,<sup>186</sup> and executives, like casino dealers and cocktail servers, dress in ways that are defined according to whether they are "too sexy" or "not sexy enough," "too feminine," or "not feminine enough." Often, a woman's job prospects and ability to advance within an enterprise are linked to her setting the proper gender tone on the scale of commodification.<sup>187</sup> Because nearly all women at work experience gender or sexual commodification to some degree, permitting sexual harassment law to draw bright lines between women who work in jobs that are socially acceptable and those who do not is counterproductive and harmful to women workers.

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186. See Kathleen A. Bergin, *Sexualized Advocacy: The Ascendant Backlash Against Female Lawyers*, 18 YALE J.L. & FEMINISM 191 (2006).

187. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989) (holding that discrimination based on a woman's failure to conform to gender stereotypes is discrimination "because of sex" under Title VII). Vicki Schultz argues that sexual harassment jurisprudence, combined with the excessive policing by human resource departments of sexual content at work, has sanitized the workplace of sexuality while ignoring the greater harm of workplace segregation by sex, which leads to serious sex discrimination and harassment. See generally Schultz, *supra* note 184. The strict policing of "gender tone" is another example of the fine line that women walk in a "man's job." The banishment of all sexuality from the workplace can harm women because women are associated with sexuality and are expected to attempt to conceal all sexuality. At the same time, they are expected to conform to gender norms.

Finally, the literature on commodification<sup>188</sup> and emotional labor demonstrates that many individuals engage in work that requires the commodification or sale of intimate selves. Increasingly service employees must give up part of themselves to soothe the tempers and spirits of customers. This emotional labor, if not sexual in nature, is often gendered. The lines between sex work, work in a highly sexualized environment, and other work requiring employees to “sell” their sex or gender or to give up control over their intimate emotions are hazy.<sup>189</sup> Many jobs that are considered honorable require women to conform to gendered expectations and to sell their most intimate selves. Attaching a stigma to work performed by women in highly sexualized environments or sex work itself has no rational basis and does not justify the conclusion that women who work in the sex industry or in sexy workplaces deserve sexual harassment.

The definitions of sexual harassment will necessarily vary in these jobs, however, depending on the context of the job. The Supreme Court made clear, in *Oncale v. Sundowner Offshore Services, Inc.*, that the context in which behavior occurs is relevant to determining whether an illegal hostile work environment exists.<sup>190</sup> Because *Oncale* does not define the term “context,” important issues remain concerning the interpretation of “context” in the

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188. See Nussbaum, *supra* note 47. Commodification scholars address the thorny question of whether prostitution should be legalized and regulated. While I do not address this underlying policy question in this paper, commodification research is relevant to prostitutes' ability to sue for sexual harassment. In *Contested Commodities*, Margaret Radin argues for a regulatory regime of “incomplete commodification.” See generally MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996). Radin posits that women's sexuality today is “incompletely commodified” because there are both market and non-market aspects of women's sexual relationships with men. However, the ideal of equal relationships between men and women misleads us into believing that unequal relationships are equal (and, as a corollary, that relationships do not involve commodification of sexuality). *Id.* at 134. Given this context, Radin posits, requiring market-inalienability of sexuality is harmful because criminalizing prostitution punishes prostitutes for behavior that is not that different from that of non-prostituted women in sexual relationships with men “because . . . [the prostitutes'] class or race forecloses more socially acceptable forms of sexual bargaining.” *Id.* See also Ann Lucas, *The Currency of Sex: Prostitution, Law and Commodification*, in *RETHINKING COMMODIFICATION*, *supra* note 47, at 248 (arguing that, like wisdom and analysis sold by an expert witness, selling sexual services does not diminish or exhaust the product sold, and concluding that the law should regulate prostitution like other work with a focus toward eliminating stigma and improving working conditions).

189. This view is consistent with that expressed by Viviana Zelizer. Zelizer explains that social scientists tend to view the issue of intimate relations and economic relations in two ways. One group sees intimate relations and economic relations as separate spheres that should be distinguished so that they do not corrupt one another; another views all intimate relations as commodities in the marketplace. These views are surprising because they fail to “recognize how regularly intimate relations coexist with economic transactions without apparent damage to either one . . .” Intimate and economic relationships are intertwined, and often they mingle as “good matches.” See Viviana A. Zelizer, *Money, Power, and Sex*, 18 *YALE J.L. & FEMINISM* 303 (2006). Assuming that women who are sex(y) workers work in environments that are free of sexual harassment, discrimination, and exploitation, their relationships with their customers and their employers may conceivably constitute “good matches.”

190. 523 U.S. 75, 81-82 (1998) (stating that “careful consideration of the social context in which particular behavior occurs and is experienced by its target” is necessary to determine whether a hostile work environment occurs).

sexualized environment and its role in determining employer liability for the harassment of sex(y) workers.

## *B. Hostile Work Environment Standards for Sexualized Industries*

### *1. A Primer on Sexual Harassment Law*

While the express language of Title VII does not forbid harassment, in 1980 the Equal Employment Opportunity Commission (EEOC) promulgated guidelines to hold an employer liable under Title VII for sexual harassment.<sup>191</sup> Lower courts soon followed the EEOC lead.<sup>192</sup> In *Meritor Savings Bank v. Vinson*,<sup>193</sup> the United States Supreme Court agreed.

As mentioned in Part I above, an actionable hostile work environment exists under Title VII if the harassment is unwelcome,<sup>194</sup> and sufficiently severe or pervasive to alter the terms, conditions, or privileges of the plaintiff's employment from both objective and subjective perspectives.<sup>195</sup> If the harasser is a customer, courts hold the employer liable if the plaintiff proves that the employer knew or had reason to know of the harassment and did not take corrective measures.<sup>196</sup> Following EEOC guidelines,<sup>197</sup> courts have interpreted

191. The EEOC Guidelines state that conduct constitutes actionable sexual harassment under Title VII if it has the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3) (1985).

192. See, e.g., *Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

193. 477 U.S. 57 (1986).

194. In *Meritor Savings Bank*, the plaintiff engaged in consensual sexual intercourse with her supervisor over a long period of time. She argued that although she voluntarily acquiesced to her supervisor's sexual advances, his behavior was unwelcome. *Id.* at 68-69. The Supreme Court held that if a plaintiff agreed to have sexual intercourse with her supervisor or coworker, but the sexual relationship was unwelcome, she may have a cause of action, even though her acquiescence was voluntary. *Id.* at 73.

195. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

196. *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998) (applying the negligence standard to customer harassment in order to uphold a jury verdict for plaintiff waitress who was subject to a customer pulling her hair and grabbing her breast and putting his mouth on it because her supervisor had ordered her to wait on men despite notice that the same men on other occasions had harassed her); *Crist v. Focus Homes*, 122 F.3d 1107 (8th Cir. 1997) (reversing the district court's grant of summary judgment where an employer operating a group home did not respond upon repeated notification that a developmentally disabled boy acted out sexual aggressions against staff); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998) (indicating that employer's knowledge of harassment combined with inaction might constitute "demonstrable negligence"); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 759 (1998) (noting that negligence sets a minimum standard for employer liability under Title VII).

197. The EEOC Guidelines state:

An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.



this standard to apply to customer harassment of employees in Las Vegas casinos.<sup>198</sup>

## 2. Unwelcomeness

The unwelcomeness requirement has spawned considerable scholarly critique<sup>199</sup> in large part because courts infuse it with their own attitudes concerning women's acceptable behavior. Courts have held, for example, that by using foul language and "unladylike behavior," a woman welcomes violent, misogynist behavior in predominately male workplaces.<sup>200</sup> Because the woman participates in behavior that falls short of "ladylike," the court concludes that she welcomes physical assaults.<sup>201</sup> Empirical research, however, shows that a

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29 C.F.R. § 1604.11(e) (1985).

While the guidelines are not controlling on the courts, the Supreme Court has stated that EEOC rulings and interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976). In *Meritor Savings Bank*, the Supreme Court accepted the EEOC Guidelines referring to hostile work environment claims of sexual harassment. 477 U.S. at 65.

198. See *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 755 (9th Cir. 1997) (holding that "an employer may be held liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct"); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992). See also *EEOC v. Newtown Inn Assocs.*, 647 F. Supp. 957, 958 (E.D. Va. 1986) (assuming that employer will be responsible for sexual harassment of cocktail waitresses by the customers where waitresses are required to wear skimpy uniforms); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981) (holding that the plaintiff established a cause of action under Title VII where the employer required that the plaintiff, a lobby hostess, wear an ill-fitting, skimpy "Bicentennial" outfit that subjected her to repeated harassment including lewd comments and sexual propositions in the lobby).

199. See, e.g., THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* 62-96 (2004); Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 734-35 (2002) (arguing that the unwelcomeness requirement is inappropriate in hostile work environment cases based on gender-based comments or behavior).

200. See, e.g., *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721 (8th Cir. 2000) (upholding the lower court's grant of summary judgment to the defendant on a hostile work environment claim in part because the plaintiff's behavior, which included foul language, welcomed at least verbal abuse); *Reed v. Shepard*, 939 F.2d 484, 487 (7th Cir. 1991) (concluding that severely violent behavior such as use of a cattle prod on the plaintiff was "welcome" given that the plaintiff "participated freely in many of these antics and in fact instigated some of them"); *Weinsheimer v. Rockwell Int'l Corp.*, 754 F. Supp. 1559, 1563-64 (M.D. Fla. 1990) (concluding that plaintiff's "willing and frequent" use of crude language and sexual innuendo demonstrated that she welcomed egregious behavior). But see *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1009 (7th Cir. 1994) (overturning the lower court's judgment in favor of the defendant where male coworkers made derogatory remarks of a sexual character on a daily basis and disrobed and urinated in front of the plaintiff, among other egregious behavior).

201. This conclusion is empirically incorrect. See generally BEINER, *supra* note 199. Beiner explains that some courts have difficulty understanding women who respond to vulgar environments with their own vulgarity. *Id.* at 95-96. Some courts misinterpret the woman's "unladylike" behavior in these rough workplaces as welcoming of coworkers' harassing behavior. As Beiner suggests, this interpretation relies on the stereotype of the decent woman who acts in a passive, ladylike fashion. If the woman does not conform to this stereotype, these courts conclude that the woman is "unharassable." *Id.* at 95.

significant minority of women attempt to conform to their workplace environment by “playing along”—using foul language or “unladylike” behavior in response to the same or worse behavior by male counterparts.<sup>202</sup>

A court that misinterprets the woman’s foul language or “unladylike” behavior permits male coworkers in predominantly male jobs to punish the plaintiff for emasculating her male coworkers (by working in a “man’s job”). By questioning the sexual purity and/or appropriateness of the complainant, the court ratifies the abuse. Through this interpretation of the unwelcomeness requirement, Title VII, which was intended to eliminate discrimination, becomes the enforcer of aggressive masculinities; it conspires with the male workers to assure their masculinity by securing particular work for men.<sup>203</sup>

The unwelcomeness requirement has the potential for serious damage in the context of customer harassment in highly sexualized environments. At the extreme, courts could conclude, as a matter of law, that women who choose to work in sexualized environments or wear revealing costumes welcome harassment. If the unwelcomeness requirement were interpreted in this way, a plaintiff would be forced to negate the assumption of welcomeness in her *prima facie* case. Even if courts did not reach this conclusion merely by looking at the job or environment in question, if the woman engages in sexual banter or flirtation<sup>204</sup> or uses foul language with customers, courts could conclude that she welcomed the behavior. This conclusion, however, would reinforce the stereotype that there are two types of women: asexual “good girls” and hypersexual “bad girls.” These stereotypes wrongfully absolve men of responsibility for abusive, harassing behavior. To assume that women who work in sexualized environments welcome violent misogynist behavior harms working women by inviting harassment and refusing to credit these women’s explanations of harm.

Moreover, this assumption places emphasis on the job choices of individual women and the actions of individual men, rather than focusing on the environment created by the business owner. A business that creates a risk of serious harassment should develop systems to prevent and correct harassing behavior. The law should create incentives for highly sexualized businesses to develop these prevention and correction mechanisms.

In cases of women blackjack dealers and cocktail waitresses, the court should permit expert testimony explaining the research on gender stereotyping, explain to the jury the inaccuracies of prevalent gender stereotypes in popular culture, and instruct the jury that the mere acceptance of a job in a highly

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202. See *id.* at 84–85.

203. See McGinley, *supra* note 9, at 362–68.

204. The dealers I interviewed told me that some of their coworkers respond to the environment by flirting with the customers. See, e.g., Interview with blackjack dealer, in Las Vegas, Nev. (Mar. 17, 2005).

sexualized environment or the wearing of a revealing costume<sup>205</sup> is insufficient evidence to support a finding that a woman welcomes gender-based or sexually abusive language or touching. Moreover, given the proper evidentiary foundation, the judge should instruct the jury that empirical research demonstrates that women sometimes use foul language or “unladylike” behavior in an attempt to “fit in” at work. This language and behavior, therefore, is also insufficient evidence to support a finding that the woman welcomes harassing behavior.

In *Meritor Savings Bank*, the Court held that a plaintiff may voluntarily participate in sexual activity with her boss but still not welcome the behavior for the purposes of Title VII. The pressure placed on the woman by her supervisor is relevant to determining whether the behavior is unwelcome.<sup>206</sup> When confronting harassment by customers, the fact finder should therefore consider the three-way relationship between the supervisor, the customer, and the worker. If the supervisor punishes or otherwise discriminates against women who refuse to accept harassing customer behavior or if there is an expectation that the employee not complain or respond negatively to the customer’s harassment, the jury should consider this fact as evidence that the woman did not welcome the behavior, even though she may have acquiesced to it.

In the gentleman’s club or brothel, there is a complicated interplay between the unwelcomeness and the severe or pervasive requirements. If a particular behavior is a term or condition of employment, a woman employee should not prevail in a Title VII suit even if she does not welcome the behavior, because harassment is actionable only if it is sufficiently severe or pervasive to *alter* the woman’s terms, conditions, or privileges of employment. There can be no alteration of a term or condition of employment if acquiescing to certain behavior is a term or condition of the job. If, however, a particular behavior is not a term or condition of employment, the plaintiff may prevail by showing that it was unwelcome and sufficiently severe or pervasive to alter the terms or conditions of employment.

Lap dances provide a good example. While some exotic dancers feel forced to perform lap dances by the management and have favored proposed bans on lap dancing in gentlemen’s clubs,<sup>207</sup> others, who believe that they are able to

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205. *Meritor Savings Bank* overturned the lower court’s decision creating a per se rule that a woman’s “sexually provocative speech or dress” is irrelevant as a matter of law to the determination of whether she found the sexual advances unwelcome. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68-69 (1986). Instead, the Court ruled, the trier of fact must determine whether sexual harassment existed in “in light of ‘the record as a whole’ and ‘the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.’” *Id.* at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)). Federal Rule of Evidence 412, which was amended to extend the “rape shield law” to civil cases, has partially overruled this portion of *Meritor*. FED. R. EVID. 412. See McGinley, *supra* note 8.

206. *Meritor Sav. Bank*, 477 U.S. at 68.

207. See Lewis, *supra* note 96, at 206-07, 210-11.

maintain control over the client while performing the lap dance, oppose such a ban.<sup>208</sup> A study in Ontario, Canada, revealed that dancers who favor a ban on lap dancing express disgust at physical contact with the patron and his emissions; they describe feelings of disempowerment and victimization resulting from repeated requests or pressure to engage in sexual activities with clients.<sup>209</sup> These women report that they are harmed by lap dancing; performing lap dances affects their self-images and they begin to dislike their jobs, feeling polluted by the men and "akin to prostitutes."<sup>210</sup>

This study raises legitimate issues concerning whether the women welcomed the lap dances and the customers' responses. In some instances, dancers engage in lap dancing because their bosses and/or the customers pressure them to do so. If an exotic dancer can demonstrate that giving a lap dance was "unwelcome," she may be able to establish a sexual harassment suit against her employer if lap dances do not constitute a term or condition of employment. However, if lap dances are necessary to the job performance and relate to the essence of the employer's business, and the employer's expectations that the worker perform lap dances are either implicitly or expressly communicated to the dancer at the time she takes the job, lap dancing may be a term or condition of employment. In such a case, requiring a dancer to perform lap dances, even if she does not welcome the lap dance, would not alter the terms or conditions of employment.<sup>211</sup>

Welcoming and agreeing to perform a lap dance, however, does not indicate that the woman welcomes other sexual behavior such as sexual intercourse, cunnilingus, masturbation, or touching of her genitals or breasts. Neither does performing a lap dance demonstrate that acquiescing to other more intimate sexual behaviors is a term or condition of the dancer's employment.<sup>212</sup>

To determine whether the behavior is welcome, the fact finder should consider the behavior that is the "norm" in the particular club in which the dancer performs, the behavior tolerated by the exotic dancer in the past, the specific signals she gave to the alleged harasser or harassers that the behavior was unwelcome, and whether she voiced opposition to her employer concerning certain behavior or specific customers. If the dancer expresses or demonstrates an unwillingness to be touched either to her employer or directly to the customer, she has not welcomed the touching.

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208. *Id.* at 211-12.

209. *Id.* at 210.

210. *Id.* at 211.

211. For a fuller discussion of terms or conditions of employment, see *infra* Part III.B.3.

212. In fact, in Las Vegas, the City Council regulates the behavior that can take place during a lap dance. JORDAN, *supra* note 85, at 108. If the behavior is permissible under local law but is not a term or condition of employment, a dancer should be able to refuse to engage in the behavior without repercussion.

### 3. Severity or Pervasiveness and Reasonable Persons

A plaintiff proves a violation of Title VII by demonstrating that unwelcome harassment is sufficiently severe or pervasive by objective<sup>213</sup> and subjective measures<sup>214</sup> to alter the terms or conditions of employment. In determining severity or pervasiveness, the fact finder considers the workplace environment in its totality.<sup>215</sup> An important question in cases brought by workers in highly sexualized environments is how the workplace context of a casino, a gentleman's club, or a brothel should affect the determination of whether a reasonable person would consider the harassment sufficiently severe or pervasive to alter the terms or conditions of employment.

In *Oncale v. Sundowner Offshore Services*,<sup>216</sup> the Supreme Court endorsed the consideration of the social context "*in which particular behavior occurs and is experienced by its target*" in deciding whether behavior is sufficiently severe or pervasive to alter the terms or conditions of employment.<sup>217</sup> To interpret *Oncale*, however, as permitting industries to immunize themselves against claims of sexual harassment would undermine the purposes and policies of Title VII and create an incentive to not prevent or remedy sexually harassing environments in these industries. Women working in blue-collar workplaces and sexualized industries may have to endure some rough language and inappropriate jokes. A hypersensitive woman who cannot tolerate a four-letter

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213. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)). There is a split among the circuits concerning whether the objective standard is the "reasonable woman" standard or the "reasonable person" standard. Compare *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting the "reasonable woman" standard), with *Richardson v. NY State Dep't of Corr. Servs.*, 180 F.3d 426, 436 n.3 (2d Cir. 1999) (refusing to adopt the "reasonable woman" standard because it would reinforce stereotypes about women). See also *Brennan v. Metro. Opera Ass'n*, 192 F.3d 310, 320-21 (2d Cir. 1999) (Newman, J., concurring in part and dissenting in part) (noting that the Second Circuit has used both the reasonable person and the reasonable woman standards and concluding that the reasonable person standard may reinforce stereotypical views that Title VII was designed to eliminate).

214. *Harris*, 510 U.S. at 21.

215. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998); *Harris*, 510 U.S. at 21; *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 193 (4th Cir. 2000); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 562-63 (6th Cir. 1999).

216. 523 U.S. 75 (1998).

217. *Id.* at 81 (emphasis added). Relying on *Oncale*, student commentator Amanda Helm Wright argues that defendants operating certain workplaces should defend against hostile work environment claims by presenting evidence that the plaintiff knew of and accepted, up front, that the workplace was a rough, vulgar environment. Amanda Helm Wright, Note, *From the Factory to the Firm: Clarifying Standards for Blue-Collar and White-Collar Sexual Harassment Claims Under Title VII of the Civil Rights Act of 1964*, 2001 U. ILL. L. REV. 1085 *passim*; see also *id.* at 1103 (advising employers to ask women going to work in certain environments to sign waivers agreeing to assume the risk of any injury suffered as a result of the rough, vulgar workplace). Some would use the "social context" or the "workplace culture" to consider the motivations of the employees, whether the behavior is welcome, and the severity of the behavior. See Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 488-90 (2002). This is an expansion beyond the use recommended by *Oncale*. In *Oncale*, the Court accepted the use of the "social context" only to determine whether the behavior was sufficiently severe or pervasive to alter the terms or conditions of employment. 523 U.S. at 81-82.

word should not prevail in a lawsuit alleging that the use of foul language in these workplaces creates a hostile working environment. But, to the extent that comments, language, and jokes are either directed at women with a conscious or unconscious intent of driving them out of the workplace or tend to subjugate women in general, the behavior may be actionable.<sup>218</sup>

The “terms, conditions or privileges”<sup>219</sup> of employment will necessarily vary with the job in question and the particular workplace. In sexualized environments, the jury must consider what the terms or conditions of the employment are and then decide whether they have been altered subjectively and objectively.

To determine whether particular behavior constitutes a term or condition of employment in a sexualized industry one must examine three questions: 1) whether the behavior in question is necessary to the particular job performed by the employee; 2) whether it relates to the essence of the business in which the job is performed; and 3) whether the employer communicated to the employee, either implicitly or explicitly, that this behavior constituted part of the employee’s job. If the environment created by the customer fails to meet any element of this three-part test, the resulting environment is not a term or condition of employment that the employee should have to suffer.

For example, a term or condition of employment for exotic dancers in gentlemen’s clubs may require tolerating hooting and staring from the audience. In the context of an exotic dancer’s job, in other words, being asked to endure hooting and staring would not alter the terms or conditions of employment, because tolerating this behavior *is* a term or condition of employment.<sup>220</sup> In contrast, a casino card dealer who experiences pervasive hooting and staring could reasonably conclude that the behavior altered her terms or conditions of employment because enduring this behavior is not necessary to the performance of her job and does not relate to the essence of her employer’s business—especially if the behavior tends to subordinate her or women in general.<sup>221</sup>

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218. The context in many jobs would also, in my view, require the fact finder to consider whether the women are outnumbered by the men in the particular jobs they perform or in the workplace in general. See Schultz, *supra* note 27, at 1797 (“Harassment is thus both a cause and a consequence of larger forms of gender-based stratification of work, such as job segregation by sex and the accompanying wage and status inequalities.”).

219. 42 U.S.C. § 2000e-2(a)(1) (2000). See also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

220. In contrast, by merely accepting the job, exotic dancers may not have consented implicitly to touching or other lewd behavior.

221. The test should be similar to that for bona fide occupational qualifications (BFOQ). The statute provides that “it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. § 2000e-2(e)(1) (2000). In *UAW v. Johnson Controls, Inc.*, the Supreme Court established two requirements for application of the BFOQ defense: First, the sex or sex-based characteristic must be objectively and verifiably necessary to

### a. Blackjack Dealers

At all casinos, the stress of maintaining “game pace” is a term or condition of employment. At the Hard Rock Hotel & Casino, working quickly in an environment where the music is loud and the patrons alcohol-soaked may also constitute a term or condition of employment. Other terms or conditions of the dealer’s job at the Hard Rock might include rock music with offensive lyrics, the customers’ offensive, but non-threatening, behavior, and perhaps even an occasional sexist remark or verbal advance from a customer. Working at the Hard Rock is not for the light-hearted.

A fact finder would rightfully conclude, however, that even at a casino that stresses sex, drugs, and rock ‘n roll, tolerating physically abusive or threatening behavior or a constant stream of derogatory comments about women is not a term or condition of employment, because tolerating these behaviors is not necessary to performing well as a dealer, and these behaviors do not relate to the essence of a gaming establishment. To the extent that abusive, gender-based conditions exist that are severe or pervasive, a reasonable person could conclude that customer behavior has altered the dealers’ terms or conditions of employment.

### b. Casino Cocktail Waitresses

The job of cocktail server in a casino would likely include such unpleasant terms or conditions as loud music, drunk patrons, and occasional gender-based jokes and comments. A reasonable person could conclude, however, that groping by customers, staring at breasts, and frequent gender-based jokes or derogatory remarks about women could be sufficiently severe or pervasive to alter the terms or conditions of the job of cocktail server, even in a casino where the atmosphere is sexualized.

While it is questionable whether being a beautiful, shapely young woman is a bona fide occupational qualification of the job of cocktail server,<sup>222</sup> even if the court were to find that the BFOQ defense protects casinos’ exclusive hiring of women to serve cocktails, the women performing this job have a right under Title VII to protection from hostile work environments created by customers and coworkers because of the server’s sex. A cocktail server’s willingness to wear a skimpy costume or to have her body surgically enhanced does not signal that she welcomes groping or has assumed the risk of this behavior. Rather, courts have held that, where the employer requires a uniform that encourages

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the employee’s performance of job tasks and responsibilities; and second, the sex or sex-based job qualification must relate to the “essence” or the “central mission” of the employer’s business. 499 U.S. 187, 203-04 (1991).

222. Casino owners would have difficulty establishing these two criteria. See McGinley, *supra* note 8.

harassment, the employer will be liable for customer harassment of the employee caused by the skimpy uniform.<sup>223</sup> This is a proper response because the employer should be held responsible for its negligent failure to prevent or to correct customer harassment that is primed or caused by the sexy costume.

### c. Exotic Dancers

An exotic dancer who strips in a gentlemen's club should reasonably expect more customer sexual behavior than the blackjack dealer or the cocktail waitress. For example, while it may be offensive for a customer to stare at and comment upon a woman blackjack dealer's breasts, such staring at the bare breasts or buttocks of a dancer performing in a gentlemen's club would constitute terms or conditions of employment. Constant crude remarks concerning a cocktail waitress' breasts or buttocks or sexual propositions may create a hostile work environment for the cocktail waitress, but in the context of the exotic dance club, enduring the same behavior may constitute terms or conditions of employment.<sup>224</sup> Notwithstanding the crude terms or conditions of an entertainer's employment, aggressive sexual behavior such as derogatory name-calling, clearly unwanted touching, stalking, or physical assault may alter those terms or conditions of the dancer's employment and may create a legally cognizable hostile work environment.

Whether a patron's touching behavior creates a hostile working environment for the dancer depends on whether the individual dancer welcomes the behavior, and, if not, whether the behavior alters the terms or conditions of employment. If an employer makes it clear from the onset of the job that a term or condition of employment is touching by customers in a state where touching is permissible, the individual dancer may not make out a cause of action for a hostile work environment on the basis of such touching. In contrast, if the behavior that the dancers are expected to tolerate is not necessary to the job, essential to the business, or a clear term or condition of employment, whether a hostile work environment exists will depend in large part on the individual dancer's willingness to tolerate the behavior.<sup>225</sup>

All women who work as exotic dancers draw lines that separate the behavior they are willing to engage in and the behavior that is off limits. According to Jordan, it is usually obvious to the bouncer when a customer goes too far. For example, a woman performing a lap dance will suddenly jump from her seat. This sudden motion indicates that the customer has touched her in a way she does not permit.<sup>226</sup> The bouncer may also notice that the dancer is

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223. See *supra* text accompanying note 198.

224. See JORDAN, *supra* note 85, at 148.

225. Burstein, *supra* note 20, at 303.

226. Interview with Jordan, *supra* note 81.



constantly removing the man's hands from her shoulder, waist, or more private parts of her body.<sup>227</sup> The good bouncer will respond immediately, telling the customer to stop; if the customer refuses to stop, the bouncer should physically remove him from the club. But if the bouncer or the management fails to enforce the reasonable expectations of the dancer, assuming that those expectations do not contradict the terms or conditions of employment, the club should be liable to employee dancers for sexual harassment by customers. Sociologist Jacqueline Lewis explains that some women object strenuously to the performance of lap dances while others, who feel that they are able to control the patron, do not mind lap dancing.<sup>228</sup> In workplaces where performing a lap dance is not a term or condition of employment, pressure on a dancer to perform a lap dance would likely create a hostile work environment for some women.

#### d. Brothel Prostitutes

Sexual contact constitutes a term or condition of a brothel prostitute's employment. Nonetheless, prostitutes should have the right to agree to the scope of certain sexual behavior with individual johns. Because these agreements are negotiated up front between a prostitute and her john and both agree on the specific acts to be performed,<sup>229</sup> these negotiations should establish the terms or conditions of the prostitute's employment. If the john goes beyond the behavior agreed to and the brothel acts negligently in preventing or correcting this behavior, the brothel prostitute should be able to establish a hostile work environment. Because brothels have elaborate procedures designed, in part, to protect the prostitute, if a brothel fails to follow these procedures it will likely be negligent and responsible for the harassment. Examples of these procedures include listening to the negotiations of the prostitute and john over the intercom, installing panic buttons in every woman's room, and announcing over the intercom when the time is up.<sup>230</sup> There are also more informal practices aimed at protecting prostitutes in many brothels. These include the pairing of a new prostitute—a "TO" or "turn-out"—with a more experienced one for training, and a madam's stationing herself near a room if she is concerned about the safety of a particular prostitute.<sup>231</sup>

Nevada state law and administrative regulations may also establish terms or conditions of employment, deviations from which may create a hostile work environment. For example, Nevada law requires the use of condoms in all

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227. *Id.*

228. See Lewis, *supra* note 96, at 210-12.

229. See SHANER, *supra* note 128, at 6-7.

230. See Brents & Hausbeck, *supra* note 157, at 277-81.

231. SHANER, *supra* note 128, at 227; Brents & Hausbeck, *supra* note 157, at 282.

exchanges.<sup>232</sup> Johns will occasionally attempt to remove condoms while they are in the midst of performing sexual acts with a prostitute.<sup>233</sup> This behavior, which is clearly outside of the scope of the terms or conditions of the prostitute's employment, can constitute sexual harassment. In Nevada, prostitutes are licensed only after testing negative for HIV, syphilis, gonorrhea, and chlamydia,<sup>234</sup> and they submit to weekly cervical smears for gonorrhea and chlamydia and monthly blood tests for syphilis and HIV.<sup>235</sup> Brents and Hausbeck's study revealed that prostitutes voice serious concern about health issues and choose to work in Nevada brothels instead of other elements of the sex industry in large part because of the protective health regulations.<sup>236</sup> When a john removes a condom during sexual contact, he practices a form of violence that may have life-threatening consequences for the prostitute.<sup>237</sup> If the brothel acts negligently in protecting the prostitute from this form of violence, it should be liable for sexual harassment.

#### 4. Subjective Severity or Pervasiveness

Besides demonstrating objective severity or pervasiveness, a plaintiff must demonstrate that she subjectively experienced the hostile work environment as altering the terms or conditions of her employment. Most courts take the plaintiff's word for this. A potential challenge to this conclusion is a defense claim that a woman's background or sexual history demonstrates that she is not subjectively offended by this type of behavior.<sup>238</sup> This argument should fail. In *Burns v. McGregor Electronic Industries*,<sup>239</sup> the Eighth Circuit held that the lower court erred as a matter of law when it concluded that the plaintiff was not subjectively offended by the harassing behavior at work because she had posed nude on a motorcycle in a magazine. The Eighth Circuit rejected this analysis, emphasizing that a plaintiff's private life, "regardless how reprehensible the trier of fact might find it to be," is not relevant to the question of whether a woman subjectively finds sexual behavior at work offensive. To conclude that this evidence is relevant, the Eighth Circuit noted, would allow a complete stranger to pursue sexual behavior at work that a female worker would accept from her husband or boyfriend.<sup>240</sup>

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232. ALBERT, *supra* note 127, at 4.

233. See SHANER, *supra* note 128, at 227 (describing an incident in which a john removed a condom forcefully and "plunged his penis back into [a prostitute]").

234. See NEV. ADMIN. CODE § 441A.800(1) (2005); Brents & Hausbeck, *supra* note 157, at 276.

235. See Brents & Hausbeck, *supra* note 157, at 276.

236. *Id.* at 288-89.

237. *Id.* at 274-75 (analyzing the dangers, risks, and fears of disease as a form of violence).

238. This analysis does not imply that the women I interviewed have such backgrounds, but I raise the question as a theoretical one.

239. 989 F.2d 959 (8th Cir. 1993).

240. *Id.* at 963. See also *Swentek v. US Air, Inc.*, 830 F.2d 552 (4th Cir. 1987) (holding that a plaintiff's use of foul language and sexual innuendo in a consensual setting does not bar her from

The *McGregor* court implicitly recognized that to require a plaintiff in a sexual harassment case to prove that she has no private sexual indiscretions in her background would reinforce all of the stereotypes of the “virtuous woman” and the “woman as temptress” and would destroy the effectiveness of the sex discrimination law. A plaintiff in a sexual harassment case need not be a paragon of sexual purity any more than a rape victim needs to be a virgin in order to prosecute the offender for rape.<sup>241</sup>

### 5. “Because of Sex”

In *Oncale v. Sundowner Offshore Services, Inc.*,<sup>242</sup> the Court held that Title VII creates a cause of action for sexual harassment where the harassers and the victim are of the same sex if the environment discriminates “because of sex.”<sup>243</sup> Historically, courts have had little trouble concluding that harassment occurs because of the victim’s sex where the harasser is a heterosexual man, the victim is a woman, and the means of harassing the victim include sexual comments or touching.<sup>244</sup> It appears, therefore, that sexual comments, touching, and grabbing in sexualized industries occur because of sex.<sup>245</sup>

Masculinities theory supports a finding that this behavior occurs “because of sex.” Men who engage in sexual assault or other forms of violence against women do so in large part because they are supported and reinforced by male peers who encourage and legitimate the abuse of women.<sup>246</sup> At the Hard Rock, women dealers are subject to misogynist behavior which occurs in response to the atmosphere created by management aimed at attracting groups of young, heterosexual men. This atmosphere encourages competition among men to demonstrate their manliness to other men. The reasons for similar or worse behavior directed at exotic dancers and brothel prostitutes are likely the same.

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bringing a sexual harassment claim for behavior occurring at work that is unwelcome); *Katz v. Dole*, 709 F.2d 251, 254 n.3 (4th Cir. 1983) (holding that plaintiff’s consensual sexual activities in private do not constitute a waiver of legal protections against unwelcome sexual harassment).

241. This is clear from Federal Rule of Evidence 412. See *supra* text accompanying note 205.

242. 523 U.S. 75 (1998).

243. *Id.* at 80.

244. *Id.*

245. See, e.g., *Bradshaw v. Golden Rd. Motor Inn*, 885 F. Supp. 1370, 1380 (D. Nev. 1995) (stating that a female plaintiff who is subjected to gender-based insults such as “fucking bitch” or “cunt” “would normally not lose on her hostile environment claim at the summary judgment stage,” but requiring evidence that the plaintiff has heard the comments).

246. Walter S. DeKeseredy & Martin D. Schwartz, *Masculinities and Interpersonal Violence*, in HANDBOOK OF STUDIES ON MEN & MASCULINITIES, *supra* note 9, at 353, 357.

#### IV. CONCLUSION: EMPOWERING SEX(Y) WORKERS TO ELIMINATE HARASSMENT

Title VII should protect women working in highly sexualized environments from sexual harassment by customers. Whether behavior creates a hostile work environment depends on the type of work performed, the location in which the work is performed, the legitimate expectations of the employer, and the subjective response of the particular worker.

A hostile work environment does not exist in a vacuum. It occurs when a reasonable person would believe, and the individual worker perceives, that the behavior and/or conditions are sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment as a matter of law. Particularly in a sexualized environment, this standard requires the fact finder to identify the terms or conditions of employment before reaching the question of whether those terms or conditions have been altered. If the employer in a sexualized environment has explicitly or implicitly communicated to its employees that certain customer behavior and environmental conditions are necessary to the job performed and relate to the essence of the business, and the employees agree, these behaviors and conditions form part of the terms or conditions of employment in the workplace, and cannot create a legally cognizable hostile working environment.

Moreover, even when certain behaviors are not terms or conditions of employment, a particular woman worker may welcome those additional behaviors. If a fact finder finds that a woman working in a highly sexualized environment has welcomed these additional behaviors, there is no hostile work environment for this particular woman even though the same behavior may create a hostile work environment for other women in the same workplace. In contrast, in a sexualized environment, unwelcome severe or pervasive behavior that falls sufficiently outside of the terms or conditions of employment may create an actionable violation of Title VII.

In making this determination, courts should guard against the conscious or unconscious use of the good girl/bad girl dichotomy. The promise of Title VII is full economic equality and participation in the marketplace by women. Because the biased structures underlying the good girl/bad girl dichotomy operate to constrain women's choices, the policies implementing Title VII should not be based in or reinforce these structures. To fulfill its promise, Title VII must reach both "good" and "bad" girls.